Q3-2021

NR&CoQuarterly ...Legal Briefs

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KARIBU!

Editor's Note

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Dear Reader,

Welcome to the third edition of our quarterly Newsletter!

The second half of the year, for most, marks the beginning of the new financial period. That said, the editorial team has put together an exciting yet informative publication focusing on employment matters, the Finance Act, dispute resolution among other things.

This quarter we welcome the newest Firm member to the Njoroge Regeru & Company Advocates team, Nancy Wagi, in a short interview. Nancy Wagi is a member of the Dispute Resolution department and gives the clients a few interesting titbits on her experience in practice and life outside practice.

On the legislative updates, we address the laws and bills passed or tabled in parliament this quarter. The Finance Act, 2021 was enacted making amendments to various legislations on tax. The update also discusses the Alternative Dispute Resolution Bill and the Kenya Immigration Bill. In previous issues of the Newsletter, we discussed the introduction of the Small Claims Court in Nairobi, we follow that up with a flow-chart of the procedure used in the said Court.

The cases highlighted this quarter are constitutional petitions on employment issues. Specifically the right to strike and the right to terminate employees during the probation period.

This edition raises awareness on the prevention of suicide, by giving a brief history on the criminalisation of attempted suicide. We also recognise World Suicide Prevention Day (WSPD) and invite everyone to be more aware of mental health care"

The Article contributions begin with an interesting piece by Njoroge Regeru and Rosemary King'ori on the Role of Truth in Dispute Resolution. As mentioned previously, this Newsletter makes particular emphasis on employment matters; a contribution from Grishon Thuo and Wangu Gatonye focuses on Sexual Harassment: What is it? What policies should organisations adopt to comply with the law? Finally, Edwin Mwangi discusses Confidentiality in the context of employer-employee relationships.

May this edition be thought provoking, and informative. Happy reading!

MEET Nancy Wagi
Dispute Resolution

(Interview by Ida Wambaa)

1. Where did you study law?
I studied law at the University of Nairobi (UoN), where I graduated in 2015.

2. What are your qualifications?
Well, I hold an LL.B, from UoN, a Post-Graduate Diploma from the Kenya School of Law and I am a Certified Mediator… I was admitted to the Roll of Advocates on 27th June, 2018.

Wow, you remember the exact date? Every Advocate remembers the date they were admitted to the bar.

3. You mentioned that you are a Certified Mediator?
Yes, I received my certification from the Mediation Training Institute (MTI).

4. Which areas of law do you practice?
I am well-versed in different areas, but I have mostly handled civil & commercial litigation, employment & labour, mediation & arbitration as well as debt recovery.

5. Debt recovery (interest peaked), could you tell me more about this?
It's mostly filing claims in court for recovery of debts.

6. You've never had to personally chase down a debtor?
(Laughs) Nothing like that. Mostly auctioneers and clerks follow up after we receive court orders; but, there are some lawyers who will handle the "investigation" process. You know, with such matters, the defaulters can become "untraceable and flee". But more often than not, the matters are settled amicably and parties come up with a payment plan.

Stay hungry, stay foolish!

7. You are currently working in the dispute resolution department, what would you say you like about it?
I have always been interested in resolving conflict. I believe that be it through mediation, arbitration or even litigation. At some point the matter must come to an end, and I am a part of that.

8. What would you say are an expert in?
Well I am 3 years post-qualification, so I think expertise comes from the areas of practice you are exposed to where you work. But I would say that I am constantly sharpening my skills on my preferred interest area. I will be adding Chartered Arbitrator to the tools in my arsenal soon.

9. Our Newletter has a thing about quotes, so… do you have a favourite quote or life philosophy?
Stay hungry, stay foolish!
I like that, what does it mean?
Always stay eager and expand your knowledge and skills. It means, never be complacent.

10. Do you have any interest or hobbies you would like to share?
(Laughs) Does law count?
I don't think so...do you like to read? I do actually; the last book I really enjoyed was, 'The Coldest Winter'. It's Russian literature, a little difficult to get through but I really enjoyed it. Enjoyed might not be the right word, it was quite sad- it's a book about the Soviet Union.

Oh yeah! I cook, that counts?

Yes…what would you say is your go to meal if you had to cook for people?
Chicken Biriani.

11. The Olympics ended a few months ago, did you manage to watch the any events?
I watched a few events, mostly athletics. However, I particularly enjoyed watching the walk race in the World Under 20 Championship where Herrington Wanyonyi represented Kenya and won gold! I was impressed and interested in a new sporting event where Kenya is represented.

12. Other than Kenya, what other teams/participants were you rooting for in the Olympics?
I was cheering on all African countries. But I think our neighbours Uganda did really well.

13. Would you like to share anything else with our clients?
Yes, they are in great hands!

LEGISLATIVE UPDATES

Notable pieces of legislation and Bills introduced in the third quarter of 2021 are as follows:

THE FINANCE ACT, 2021 (the "Act")

• Income Tax Act (Cap 470)

The Act amends the Income Tax Act (Cap 470) (the "ITA") by filling in regulatory gaps and changing the definition of certain terms under the ITA.

Accordingly, the definition of the term 'control' has been re-introduced, after its deletion by the *Tax Laws (Amendment) Act, 2020*. This definition is similar to the one proposed in the *Income Tax Bill, 2021*. The latest definition seeks to expand the threshold of those subject to paying income tax. It will therefore include instances covered under the ambit of having control over capital or management, especially when a person: holds more than 20% of company voting rights (*previously 25%*); advances a loan or gives a debt guarantee of at least 70% indebtedness; has power to appoint more than 50% of the board of directors; owns or has exclusive rights to intellectual property; supplies or purchases at least 90% of company goods; or any relationship or dealing which the Commissioner deems as constituting control.

This definition will be considered in determining the residency status of a body corporate or determining whether an entity is a parent company with tax liability in Kenya. This may be a consideration for compliance with transfer pricing provisions and may likely affect businesses dealings between residents and non-residents. It may also affect ability of foreigners to deduct foreign exchange losses on loans. Thus, increasing the compliance burden on the taxpayers falling within this new definition.

The Act further introduces the definition of the term "infrastructure bond" as: '*a bond issued by the Government for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, a communication network or energy project*'. The definition provides clarity on the types or nature of infrastructure that the Government would undertake using the proceeds of infrastructure bonds. By extension, interest income accruing from an infrastructure bond with at least a 3-year maturity period is exempt from income tax.

The definition of "permanent establishment" has also been deleted and substituted to the effect that non-resident enterprises would be considered to have created a permanent establishment in Kenya where provision of services through employees or personnel is for an aggregated period of 91 days in any 12-month period. This move is aimed towards capturing more companies and subjecting them to income tax. The new definition further aligns more closely to the international standards and guidelines for the Organisation for Economic Co-operation and Development (OECD).

The Act further expands the scope of income subject to tax by including any income generated from businesses carried over the internet or electronic networks, including a digital marketplace. It further defines the term "digital marketplace" *as: an online or electronic platform which enables users* to sell or provide services, goods or other property to other users. Digital Service Tax (DST) will thus be charged and will include income earned by non-residents from online rental property.

On tax losses, the Act has removed the provision that allows tax losses to be carried forward for 10 years and allows this to be done indefinitely. The effect of this amendment is that businesses will be able to utilize the tax losses incurred in the ordinary course of business.
(It has been suggested that this amendment was to cushion businesses from the minimum tax requirement on payment of 1% of gross turnover).

PLEASE NOTE: the payment of minimum tax under Section 12D, Income Tax Act has been declared unconstitutional in the case of *Stanley Waweru – Chairman & others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others (2021) eKLR*. In the last issue of the Newsletters *Q2-2021*, we highlighted the ruling in this case suspending implementation of this section.

The Act also amends section 12D of the ITA by introducing subsection 1A to exempt certain persons from paying minimum tax. However, in light of this section being declared unconstitutional, this amendment is of no consequence.

• Value Added Tax Act, 2013

The Act amends the Value Added Tax Act, 2013 (the "VAT Act") in relation to imported services to the effect that where a person imports a taxable service, they shall be deemed to make a taxable service whether or not they have been registered for VAT. The new amendments also increase the scope for digital services to include those for any digital marketplace or supplies made over the internet or electronic network.

The First Schedule of the VAT Act is also amended through introduction of exemptions relating to the energy and health sector and exportation services which were zero-rated and will now be tax exempt. "Zero-rated" goods do not have their sales taxed by the government but allows for VAT on inputs (lowering the price of the good). While for goods "exempt" from tax, the government does not tax the sale of the good but producers cannot claim a credit for VAT paid on inputs (this could raise the price of the good since the cost is transferred to the final consumer). The Act also re-introduces the exemption from VAT in respect of transfer assets such as real estate investment trusts and asset backed securities.

LEGISLATIVE UPDATES

• Excise Duty Act, 2015

The Act amends the Excise Duty Act, 2015 (the "EDA") to introduce provisions that will allow offset of excise duty paid by a licensed person in respect of purchase of data in bulk for resale. Accordingly, the excise data paid shall be offset against the excise duty payable by such licensed person on internet data services supplied to the final consumer. Such provisions may result in a reduction of the cost of internet to final consumers.

The Act also allows locally manufactured sugar and chocolate to be taxed excise duty at the same rate as imported products. This will mean local producers will have to compete at the international market rate. Other affected goods include the introduction of tax for: goods containing nicotine or related products, jewellers at the rate of 10%, betting at the rate of 20% of the waged amount. On the other hand, imported glass bottles will no longer have the 20% excise duty tax imposed on them.

The First Schedule of the EDA is also amended in respect of the definition of "other fees" so as to exclude 'fees or commissions earned in respect of a loan'. This means that any fees, charges or commissions charged by financial institutions relating to licensed activities shall be subject to this tax at the rate of 20% of their exercisable value.

• Stamp Duty Act (Cap 480)

This Act is amended by excluding payment of Stamp Duty for registered Family Trusts.

Conclusion

The Finance Act has amended several other legislations including the: Tax Procedures Act No. 29 of 2015, Insurance Act (Cap 487), Retirements Benefit Authority No. 29 of 1997 and Central Depositories Act No. 4 of 2000. It will therefore be necessary for organisations to familiarize themselves with the new amendments and comply with them for this financial year.

THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

This Bill is being introduced to codify a legal framework for the settlement of civil disputes. The Bill if enacted, will serve to implement Article 159 (2)(c) of the Constitution on Alternative forms of dispute resolution and Article 48 on Access to Justice through Statute. The alternative forms of dispute resolution proposed under the Bill include conciliation, mediation and traditional dispute resolution. The scope of the Bill is to address civil disputes, but excludes constitutional, election, or public interest disputes. The Bill also excludes disputes governed by the Arbitration Act.

The Bill therefore provides for the accreditation and registration of conciliators and mediators. It provides for a traditional dispute resolver. These practitioners will be introduced to act as the intermediaries between the parties in resolving disputes. The Bill sets out how persons can use these alternative forms of dispute resolution and the steps to be taken in the process. At the end of the process the parties may enter into a settlement agreement. This agreement may be recognised by the court.

The Bill details the role of the court in the alternative dispute resolution process, and the role of the advocate in resolving the matter. It therefore details procedural aspects of staying proceedings, suspension of limitation periods, costs, and the power to make rules and regulations. The Bill also seeks to amend provisions of the Civil Procedure Act, and the Nairobi Centre for International Arbitration Act.

The consequence of this legislation on banks is in being able to incorporate dispute resolution mechanisms within their contracts. These provisions will now have legal force, once the legislation is enacted. Therefore, reducing instances of parties having to use the courts as their sole means of settling disputes.

THE KENYA CITIZEN & IMMIGRATION BILL, 2021

This Bill introduces provisions for the government in collaboration with relevant financial institutions to allow for the establishment of Voluntary saving schemes. The Amendment Bill also seeks to incentivise Kenyans abroad to invest in Kenya. It proposes that through the Governor of the Central Bank of Kenya, the Cabinet Secretary for Foreign Affairs should create a database that provides information and programs that those abroad can invest in. It also imposes measures to prevent fraud for those who invest.

THE SMALL CLAIMS COURT PROCEDURES

Nature of Proceedings

The courts are designed to ensure simplicity of procedure, accessibility, cost friendliness and cultural appropriateness. Its procedure is significant for inexpensiveness, speed, and simplicity. The parties can self-represent and claims are lodged in a well guided Form as opposed to traditional pleadings that require legal structures and complexities.

The Act does not exclude a person from lodging a claim that is within the jurisdiction of the Small Claims Court in any other court if they elect to do so. Corporate bodies can only participate in this Court as defendants.

Regarding enforcement of an order of the Court, filing fees are to be paid by the losing respondent, no award of costs except for judgment in default of appearance and cost awards by High Court in relation to appeals of the Court's awards.

Cases are mandated to be heard and decided within a day thus reducing hearing periods. Any party who is not satisfied with the decision of the adjudicator can appeal to the High Court.

Once judgment is entered, the Court can order the judgement debtor to pay money either in lump sum or by instalments. Where the debtor proposes a payment plan, the court will take into consideration the debtor's monthly net income as well as the debtor's assets and liabilities in determining the instalments payable.

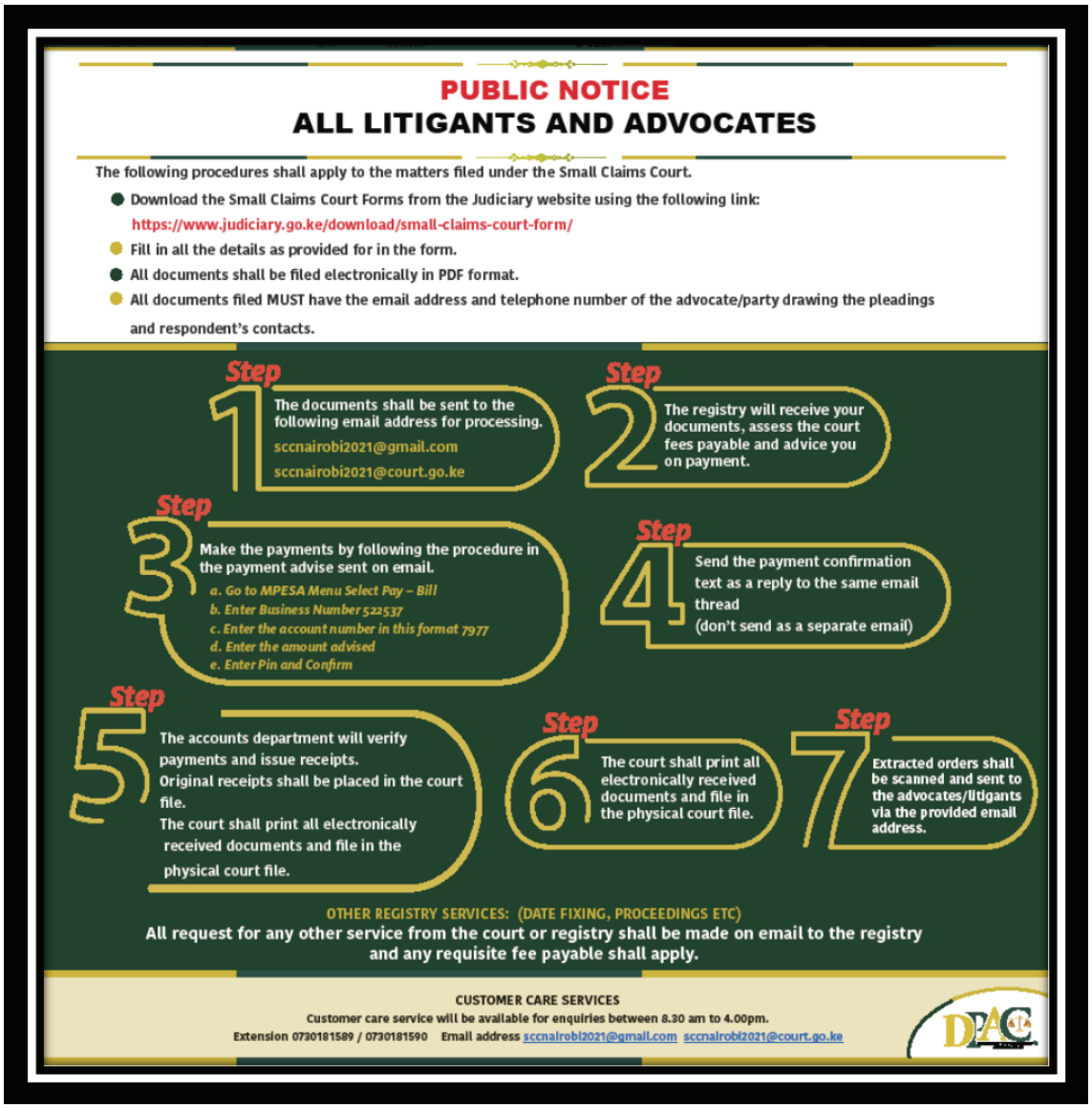
Court Administration

The Small Claims court is presided over by an Adjudicator who must be an advocate of the High Court with at least 3 (Three) years of experience in the legal field.
The Adjudicator is to undertake an inquisitive and investigatory role towards the fair administration of justice. The Small Claims Court Act requires matters to be resolved within 60 (Sixty) days of being lodged.

Court Jurisdiction

The jurisdiction of the court is limited to money claims arising from commercial contracts, loss or damage caused to any property, recovery of movable property or compensation for personal injuries. These claims must be within the pecuniary jurisdiction of the court which is capped at Kenya Shillings One Million.

The claimant or defendant must be located in or carry on business within the local limits of the jurisdiction of the Court; the subject matter of the claim must be situated within the local limits of the jurisdiction of the Court; the contract to which the claim relates must either have been made or be intended to be performed within the local limits of the Court; the cause of action must have arisen within the local limits of the Court.



CASE HIGHLIGHTS

We focus on recent constitutional cases on employment issues. These cases discuss the right to strike and termination of employment during probation periods.

JOSEPH OTIENO ORUOCH V KENYA MEDICAL PRACTITIONERS PHARMACISTS & DENTISTS UNION AND ANOTHER [2021] EKLR

This case addresses the right to take industrial action versus the right to life and quality health care. The Petitioner sought the following remedies:

- An injunction barring the Kenya Medical Practitioners, pharmacists & Dentists Union (KMPPDU) and the Kenya National Union of Nurses (KNUN) or any other of their branches from exercising the rights under Articles 37 and 41(2)(d) of the Constitution;
- A declaration that the right to life is greater than the right to picket and to go on strike and a finding that these rights are inconsistent with the general intent of the Constitution, when applied to members of the KMPPDU and the KNUN; and
- A declaration limiting the rights under Articles 37 and 41 (2)(d) for members of the KMPPDU and the KNUN, as outlined in Article 24(1) of the Constitution.

The Court stated that the right to industrial action is not absolute, and is therefore subject to limitation within the parameters of Article 24(1) of the Constitution. The Court considered the position of the International Labour Organisation as contained in the Digest of Decisions of the Freedom of Association Committee of the Governing Body that the right to go on strike may be restricted or prohibited. The European Social Charter permits restriction of the right to go on strike only in cases of protection of public interest, the rights and freedoms of other national security, public morality and health. In a South African case, it was held that not all workers employed in an industry declared to be an essential service need to be precluded from participating in a strike for that service to continue.

The Court further discussed this idea by referring to it as 'minimum service' which is what is intended to allow certain workers in an industry designated as an essential service to go on strike while at the same time maintaining a level of service where the life, personal safety or health of the whole or part of the population will not be endangered. In arriving at what constitutes 'minimum service' a detailed inquiry must be made in order to determine the category and number of employees needed to provide a 'minimum service' at an acceptable level, in the interest of other fundamental rights.

The court defined 'Minimum service' as "one that is sufficient to ensure that during the strike no person's life, personal safety or health is endangered; there must be balance to protect all fundamental rights. The court also set out the test for determining 'minimum service' as follows; Take into account employees' Constitutional right to participate in industrial action, which ought to be balanced against the general public interest;

a) An examination of specific critical or necessary services required within an essential service designation, that must be maintained at acceptable levels during the course of industrial action to ensure that life, personal safety or health of the whole or part of the population is not endangered;
b) An assessment of whether a service is superfluous or critical to the overall objective of minimum service through an examination of whether the core business of the entity/service consists of components which are/are not intertwined or interdependent; and
c) If the business components of an entity are independent, an assessment is to be made as to whether a determination of minimum service will achieve its objectives by attaching significance to any individual business component to the exclusion of any relationship with other components, or whether a composite assessment of the components would be necessary in order to achieve those objectives.

The Court relied on a case in Canada that discusses the principle of 'minimum service' s under the Public Service Essential Service Act that was enacted to limit the right to go on strike for public sector; the act has given the public employer authority to determine the classification of employees who must continue work during work stoppage, the number and names of employees within each classification and the essential services that are to be maintained.

The court felt that an outright prohibition of the right to go on strike for the members of the 1st and 2nd Respondents would derogate, from the core, the Constitutional right; they therefore decided that there would instead be a need to balance the constitutional right to go on strike and the right to life. The Court made the following orders:

a) Industrial action by health workers is not permitted unless there is a known and acceptable formula of 'minimum service' retention at every affected health facility. This limitation is in addition to those imposed by the conciliation procedures set by the Labour Relations Act;
b) The Cabinet Secretaries in charge of Health and Labour, in conjunction with all major stakeholders within the health sector, shall within the next twelve (12) months from the date of this judgement, develop and publish guidelines to give effect to order (a) above; and
c) The Registrar of the Employment and Labour Relations Court is directed to serve this judgment upon the Attorney General as well as the Cabinet Secretaries in Charge of Health and Labour.

MONICA MUNIRA KIBUCHI & 6 OTHERS V MOUNT KENYA UNIVERSITY; ATTORNEY GENERAL (INTERESTED PARTY) [2021] EKLR

The parties to this suit are Monica Kibuchi, Janis Mugambi, Milka Kuria, Frankline Gitonga, Pius Mutsoli, Lorraine Onyango and Irene Okeng'aya (the "Petitioners") versus Mount Kenya University (the "Respondent") and Attorney General as an Interested Party. The Petitioners filed a claim before the Employment and Labour Relations Court (ELRC) to declare section 41(2) of the Employment Act, 2007 (the "Act") unconstitutional. The Petitioners in this case applied for various positions advertised in the newspaper by the Respondent. The Petitioners were invited for interviews and were subsequently appointed. A term of their appointment was they were required to resign from any previous positions held as detailed in their letters of appointment. The Petitioners were required to report to duty on 1st February, 2016 for a probationary period scheduled to end on 30th April, 2016. However, around the 29th April, 2016 the Petitioners received letters of termination of their contracts, during this probation period.

The Petition was based on section 42 (1) of the Act on termination of probationary contracts which states that: (1) The provisions of Section 41 (1) shall not apply where a termination of employment terminates a probationary contract.

Section 41 (1) of the Act states: Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of:

a) misconduct,
b) poor performance, or
c) physical incapacity

explain to the employee:

i) in a language the employee understands,
ii) the reason for which the employer is considering termination, and
iii) the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

The consequence of this provision is that an employer can dismiss any employee from employment arbitrarily during the probation period. The Petitioners claim was therefore that this section violates Articles 10, 25, 41, 47 and 50 of the Constitution and therefore should be declared null and void.

The three-judge bench of the ELRC Court in reviewing this decision considered three issues for determination, specifically: jurisdiction to determine Constitutional Petitions, the Constitutionality of section 42 (1) of the Employment Act, and the whether the Respondents action to terminate the contracts was contrary to section 41 (1).

Focusing on the last two issues, the Court addressed the Constitutionality of section 42 (1) with respect to Article 47 on the right to fair administrative action and Article 50 on the right to fair hearing. The Court took notice of the legal position of termination of probation contracts outside the Kenyan jurisdiction reviewing the law in Canada and South Africa. In these jurisdictions both Courts held the position that the right to a fair hearing before termination of an employee during a probationary period was necessary.

The Court also noted that the Common Law position is that the employer had no obligation to explain the reason for termination to an employee on probation. This is because the employee is deemed to be under trial and is therefore being tested in order to determine if they match the skill-set required to actually perform the job they are set out to do. Proponents of the section in issue argue that this period is considered an extended interview period.

The Court was however persuaded by the *obiter* opinion in the case of *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi (2016) eKLR* where the Judge expressed that Article 41 of the Constitution guarantees employment and labour rights for all. This includes those engaged in probationary contracts. These rights could only be limited to the extent permitted under Article 24 of the Constitution. Thus, limiting enjoyment of a right by the mere reason of length of service did not meet that threshold.

The Court therefore applied Article 24 (1) of the Constitution on fundamental freedom in the Bill of rights not to be limited except by law. It also relied on Article 2 which recognizes the International Labour Organization (ILO) Convention on Termination of Employment which has been incorporated into the Employment Act.

In the case of Samwel G. Momanyi v the Attorney General & Another (2012) eKLR (which was also an obiter opinion) the Judge added that section 42(1) would be unconstitutional. Article 27 and 48 of the Constitution when read together with section 45 and 46 of the Employment Act (since these were the provisions being challenged in this case) were discriminatory, since they denied the employee equal protection and equal benefit under the law. According to the judge even if an employee was to be found unsuitable for a specific position during the probation period, the rights secured in Article 41 should still be respected.

The Court therefore stated that *apart from life and land ownership, employment ranks among the most emotive issues in a person's life.* Thus, the exclusionary nature of section 42 (1) as it relates to the protections contained in section 41 (1) were deemed unjustifiable and unconstitutional.

SUICIDE PREVENTION AWARENESS

Suicide Prevention Awareness

History of Section 226 of the Penal Code

[Any person who attempts to kill himself is guilty of a misdemeanour]

Suicide was criminalized, in the 10th Century, when King Edgar of England made a law that the property of someone who died by suicide would be forfeited. Forfeiture was at the time a penalty for criminals. It was therefore assumed that as a result of this, suicide should also be categorized as a crime.

The law has since developed making attempted suicide a misdemeanour, punishable by fine or a short prison sentence. Attempted suicide was previously a felony which in Kenya would be an offence punishable with death or imprisonment for three years or more.

The enlightenment in the 18th Century saw the distinction between Church and State leading many countries to rethink the view of the moral question of criminalising suicide. Furthermore, many came to see the ideas behind caring for those going through mental health challenges as more important than punishing them.

Kenya's current Penal Code is as a result of our colonial heritage, where the British replaced the Indian Penal Code with the Colonial Office Model Code, known as the Queensland Code of 1899.

What mental health needs is more sunlight, more candor, and more unashamed conversation."
– Glenn Close

The history of this law has been both a moral, philosophical, legal, historical, social and medical question. However, with new information on mental health we should now consider the health of people struggling or suffering with mental challenges, with the same degree of care and concern as those suffering from physical illnesses.

On that note, we recognize the World Suicide Prevention Day (WSPD) observed on 10th September. This day was started by the International Association for Suicide Prevention (IASP). The purpose of this organization is to raise awareness and create action plans to prevent suicide as a priority. Accordingly, this quarter we raise awareness on mental health and well-being.

The proposed Penal Code (Amendment) Bill, 2021 tabled in parliament on the 20th August, 2021 seeks to delete section 226 of the Penal Code. This would effectively make attempted suicide no longer a criminal offence; a huge step in the journey towards the creation of mental health awareness.

CONTRIBUTORS' PLATFORM

Truth versus Facts: The Role of Truth in Dispute Resolution

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(This Article was first presented during the first Primerus University event with the IPC Owl Meeting held on March 16, 2021 and subsequently published by Primerus, in the Fall, 2021 edition)

The pursuit of truth in the conduct of hearings before a judge or an arbitral tribunal is an elusive endeavour, particularly against the backdrop of evidentiary rules, constitutional rights and freedoms and in the conquest for justice. Truth fights a heavy battle with the quest for justice based on the principle of proven and unproven facts, contested versus uncontested facts. Accordingly, truth becomes replaced with the notion of proven facts.

As with any trial, the dispute resolution process commences with the filing of the various pleadings such as a statement of claim and may be rebutted with a statement of defence. To these pleadings, the different parties support their case with evidence, either documentary and/or oral evidence. However, relying on the best evidence rule, it is expected that at a minimum a witness statement shall be provided for purposes of introducing and submitting documentary evidence as exhibits before a court or arbitral tribunal. This allows the umpire, as the case may be, to test the veracity of the averments in the witness statement against the documentary evidence produced.

It is not in question, that examination-in-chief sets the pace for the prosecution witness, in terms of tempo, pace and persuasion. However, in light of the court's or arbitral tribunal's value of time, procedure dictates that examination-in-chief is kept to a minimum to the extent of the introduction of the witness, the adoption of the witness statement and the submission of the documentary evidence relied upon as exhibits for purposes of interrogation of its veracity and corroboration of the averments in the witness statements. It is at the point of cross-examination, that "truth" may be ascertained though with the overriding interest being in favour of fact. Thus, the idea of interrogating a witness's testimony for truth is not always a successful pursuit noting that the more persuasive speech takes the day.

It has long been a settled rule of common law that all evidence which is relevant to the fact in issue is admissible, regardless of how the same was obtained. Thus, for a long time, this rule found application in the admissibility of illegally obtained evidence in Kenya under the Mandatory Inclusion Approach. Accordingly, the pursuit of truth through the principle of Mandatory Inclusion seeks to have the means justify the end-truth. However, in the pursuit of justice, the focus shifts to proven facts within the confines of the law. The end is never justified by the means explored. Constitutional rights and freedoms, such as the right to privacy and the right of an accused person to remain silent and not self-incriminate, shifts the role played by truth in the quest for justice to that of fairness and legality.

Since the promulgation of the Kenyan Constitution in 2010, a shift towards mandatory exclusion of involuntarily obtained evidence continues to take shape. The Supreme Court of Kenya in *Njonjo Mue & another –vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017]* eKLR, held that:

"evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

This therefore impacts the conduct of arbitral proceedings, despite the flexibility of the rules of evidence adopted and the parties' choice of law and procedure for the conduct of arbitral proceedings. Noting that every arbitral award is subject to the public policy of the state where the recognition and enforcement of the arbitral award is sought, the exception to the Mandatory Inclusion Approach in Kenya, that is, "evidence obtained in a manner that violates any fundamental right or freedom and leads to a miscarriage of justice, must be excluded," firmly forms part of Kenya's public policy and tilts the scales of justice towards proven facts rather than truth. Truth therefore struggles to fight for its place where the primary duty of the umpire, as it were, is to do justice.

Sexual Harassment at Workspaces; What does the Law say?

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When the words "sexual harassment" are uttered they send a shiver down one's spine. Unfortunately, the reality of the world we live in is that once in a while someone is bound to come across a case of sexual harassment. Sexual harassment does not take place in any designated space; it can take place anywhere, and anyone (both men and women) can fall victim. For the purposes of this article however, we focus on sexual harassment at the workplace; an issue catered for under Section 6 of the Employment Act, 2007 (the "Employment Act").

What is sexual harassment?

The perpetrator of sexual harassment at a workplace can either be an employer, a representative of an employer or a co-worker.

Accordingly, an employee is sexually harassed if either of the said persons: -

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

   i. promise of preferential treatment in employment;
   ii. threat of detrimental treatment in employment; and/or
   iii. threat about their present or future employment status;

b) uses visual material or language, whether written (vide any mode of communication) or spoken, of a sexual nature; and/or
c) 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.

How does this affect employers?

Employers with twenty (20) or more employees are required to create and issue a policy statement on sexual harassment. The policy should contain: -

- the **definition** of sexual harassment as defined by the Employment Act;
- a **statement** that: -
  - every employee is entitled to employment free of sexual harassment;
  - the employer shall take steps to ensure that no employee is subjected to sexual harassment;
  - the employer shall ensure appropriate disciplinary measures are taken against any person under the employer's direction who subjects any employee to sexual harassment; [please who subjects any employee to sexual harassment [please note that such disciplinary hearings should be substantively and procedurally fair which includes but is not limited to a fair hearing]
  - explains the procedure of how sexual harassment complaints may be brought to the attention of the employer; and
  - the name of the complainant and the circumstances related to the complaint shall be kept confidential save where disclosure is absolutely necessary for purposes of investigating the complaint or taking disciplinary measures.

Such policy should be made after consultations with employees or their representatives. In preparing such a policy, employers should have the following in mind: -

a) express prohibition of sexual harassment;
b) a statement as to the employer's responsibility;
c) a statement as to protection against retaliation;
d) the complaint procedure;
e) the investigation procedure;
f) the appeal process; and
g) sanction/penalty provisions

Lastly, an employer is required to bring the sexual harassment policy to the attention of every employee or anyone under the employer's direction.

CONTRIBUTORS' PLATFORM

Why is this important?

There are a number of cases that have been decided on the matter of sexual harassment in line with the Employment Act. The cases, in summary, have concluded that: -

"Employers must foster a conducive working environment free from sexual discrimination, exploitation and harassment by their immediate superiors, and/or co-workers."

A sexual harassment policy is thus necessary, and must be in line with the explicit requirements of the Employment Act; if not, the employer is liable to a fine not exceeding Kenya Shillings Fifty Thousand (Kshs.50,000.00) or to imprisonment for a term not exceeding three (3) months or both such fine and imprisonment. Additionally, if the matter is not dealt with as stated in the sexual harassment policy, then the organisation violates the claimant's right not to be discriminated on account of sex which would entitle them to compensation.

An organisation must keep to their sexual harassment policy and to the procedure they have set; if not, the court will find the employer as equally liable as the perpetrator of the harassment.

With respect to the complaints procedure, it is vital for the employer to have a reporting mechanism that makes employees feel safe to report sexual harassment. The employer should therefore ensure that they cultivate an environment that facilitates such reporting.

Complaints should be dealt with confidentially; in a manner that upholds human dignity and privacy of the complainant. The organisation must also ensure that the complaint is verified through a proper investigative procedure which should be done in an expeditious and impartial manner with the findings being reported to the complainant respectfully.

Conclusion

It is important to remember that sexual harassment does not have a model victim nor is there a model perpetrator; it affects both men and women. Furthermore, a perpetrator can be in a senior level, same level, and even in some cases, a lower level position. It is thus vital for the employer to ensure the safety of their employees, as they have a duty of care not just legally, but also personally in their capacity as an employer. Better to be safe than sorry.

Prevention Is Better Than Cure.

Confidentiality within the Workplace

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The years 2020 and 2021 have really been a test for everyone: well, at least for the majority of people. Many have lost their jobs, endured pay cuts, embraced the new norm of having to wear the at-times-cumbersome-yet-life-saving face masks, sanitize and not forgetting the true test of any form of human interaction, social distancing.

Workspaces have had to be redefined thereby necessitating innovation with regards to what is now referred to as the "New Normal." This in turn has put a stretch on the very fundamental principles that make any workplace habitable and operational.

Access to information being the most sensitive field, adjustments have had to be made in the manner in which information, whether sensitive or not, is relayed. This becomes especially crucial when it comes to the dissemination of information through online means.

Confidentiality (be it client or employee related) within the workspace has thus had to undergo a transformation. This then begs the question: how safe is personal and private information?

"Confidentiality is the essence of being trusted." – Billy Graham

The above quote resonates with the silent rule that confidentiality thrives in an environment where trust is cultivated and nurtured. In its absence, the legal profession together with other sectors may lose a considerable chunk of their clientele.

Confidentiality forms the very basis of any relationship be it contractual or social. In as much as it is a social virtue within any given society, it tends to attract a strict legislative approach with far reaching consequences in the very event that it is misapplied.

Take for instance the case of *VMK v CUEA case No. 1161 of 2010* where the Claimant was subjected to several tests including

a HIV test without her knowledge or consent. The sole purpose of the test was to ascertain whether she was fit for permanent employment. In the Court's eyes this intrusion fell within the definition of section 5(*2*) of the Employment Act which provides that: "An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice." Further, *subsection* (*3*) provides; "No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee –

a) On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or **HIV status** (emphasis ours);

b) In respect of recruitment, training, promotion terms and conditions of employment or other matters arising out of the employment."

In this case, the learned Judge found that it was discriminatory for the institution ("the Respondent") to test the Claimant for HIV without her consent or knowledge.

The Court further found their conduct to be degrading and dehumanizing by sharing her HIV status with colleagues and superiors at the work place without her consent. Finally, the termination of her employment contract based on her HIV status and pregnancy contrary to section 29(2) of the Employment Act was found to be in clear violation of Article 28 of the Constitution of Kenya 2010 which states that "Every person has inherent dignity and the right to have that dignity respected and protected."

The Court therefore places the onus on employers to maintain, recognize, respect and protect employees through proper and favourable work policies and practices. The judgment in the aforementioned case further went on to put into perspective that, "…no workers should be required to undertake a HIV test or disclose their HIV status." This in its very definition amounted to discrimination not forgetting the stigmatization that follows.

The general connotation being drawn from the above is that it is both the social and legal responsibility of every party to provide a healthy environment within which persons can operate and achieve optimum productivity.

This in particular draws reference to the current situation occasioned by the COVID-19 pandemic and more so the policies being enforced nationwide requiring staff to get tested and even further requiring them to get vaccinated lest they be illegible to receive government services or even operate in their capacity as civil servants.

Employers must therefore be proactive to ensure they do not find themselves in breach of their employees rights, as was illustrated in the CUEA case mentioned above. Employers should thus put in place measures or policies to ensure they are keeping personal private information of their employees confidential.

Furthermore, they must seek consent of the employees before disclosing such information to third parties. These measures would go a long way in ensuring employers do not find themselves in breach of the law.

ARBOR HOUSE ARBITRATION CENTRE (AHAC): MEETING THE CHALLENGES OF VIRTUAL DELIVERY OF JUSTICE

With the onset of the COVID -19 Pandemic in March 2020, many professionals in different fields were greatly affected. This was due to the devastating effects of the disease and the strict measures that the Government put in place to curb the pandemic. The measures, which came to be commonly known as Health Protocols, such as practising social distancing, ban of all social gatherings and the imposition of curfew meant that most peoples way of life were adversely affected. The pandemic also led to the emergence of new and innovative work practices to conform to the drastic regulations which were being enforced strictly. Some companies closed down, others continued amid the pandemic while others opted to have their employees work virtually from home.

One of the sectors that was forced to improvise ways and means of conducting its business amidst the pandemic was the Judiciary. Even with the closure of courts, there was need to continue with the administration of justice, whilst at the same time safeguarding the health of all those involved. Due to this, the judiciary introduced virtual methods of serving its clients. Legal Practitioners, particularly those involved in Litigation and Alternative Dispute Resolution (ADR) were adversely affected.

For dispute resolution matters, working virtually was not an ideal solution, the in-person interactions being preferred for obvious reasons. Due to the restriction on access to the courts, most parties and their counsels began seeking alternative means of resolving their disputes. Accordingly, there was an upsurge in the use of Arbitration, Mediation and other forms of ADR. This created a need for ideal venues at which to conduct proceedings.

It is against the background outlined above that Arbor House Arbitration Center (AHAC) was

set up with a view to providing a discreet, quiet and pleasant environment in which lawyers, other professionals and their clients could meet to resolve disputes.

AHAC enjoys a number of attributes which make it an ideal venue for your next meeting, workshop, training or for conducting legal proceedings;

1. Location

AHAC is located in close proximity to most major commercial centres including the Central Business District (CBD), Westlands, Lavington, Upper hill and Kilimani area.

2. Accessibility

AHAC is easily accessible through modern bypasses, highways, and ring roads. The Centre enjoys a location outside the congested sections of the City, free from traffic jams that most of the other areas experience at all times.

3. Tech Savvy conference rooms

AHAC venues have been equipped with the latest technology to ensure your needs are met. Our clients can host conference meetings with their team from anywhere in the world with the assurance of quality uninterrupted connectivity.

Our internet speeds are fast with a high bandwidth to accommodate large numbers of users at a given time, without any technical hitches.

We have a standby backup generator which ensures that your sessions will be uninterrupted even without the main power outage.

We have also advanced in putting security measures in our network to ensure the privacy of all our clients is safeguarded while they use our Internet. Our dedicated team of IT technicians are always on standby to assist with any connectivity issues.

4. Environment.
AHAC is located in a serene environment with a pleasant view of the adjacent Arboretum Forest, along the Arboretum Drive. The surrounding exotic trees create a clean atmosphere, away from all the pollution. The ambience also attracts different kinds of birds which are a sight to behold through our huge windows facing the trees. We also have a spacious break out outdoor area with comfortable outdoor furniture for those short breaks in between your meetings.

5. Affordability
For as little as KShs 40,000 +VAT per day, you get the space which can sit up to 20 people, inclusive of high-speed Wi-Fi and conferencing facilities. The space is big enough to allow for social distancing and well aired with natural lighting owing to the modern design of the building. Your team will enjoy a snack and beverage setup served twice per day, if you host a full day meeting. For half day bookings, we offer the space at a cost of KShs 20,000 +VAT.

6. Diversity of Available spaces
Our set up ensures that all COVID protocols are strictly adhered to with sanitizers stationed at the entrance points. Apart from conference rooms, we also have a variety of other office solutions for both long-term and short-term needs. The monthly office rates are as follows: -

- Co-working space at Kshs 18,000 +VAT per desk.
- 4 Person Private Office at Kshs 80,000 + VAT
- 6 Person Private Office at Kshs 120,000 + VAT
- Corner Office at Kshs 100,000 +VAT

7. Parking
We have secure and ample parking at the basement level, ground floor levels and across the road, enough to accommodate a big number of vehicles for your team. Our 24hrs security surveillance cameras and team give you the assurance that your vehicle is secured.

8. Support Services
Support services offered include printing, photocopying, binding, scanning and telephone call service, at established affordable rates.

9. Bookings
To make a booking, please feel free to reach us on our social media platforms, website and through our numbers as indicated below;

Cell phone: 0706808080
Email: info@ahbc.co.ke
Website: http://ahbc.co.ke
Social media handles : Ahacarborhouse

We look forward to hosting you at AHAC soon! Pauline Mumbi - Manager

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