NR & CO.
QUARTERLY

ISSUE #03/2022

Legal Briefs

Workplace Mental Health

Legislative Update

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EDITOR'S NOTE

Dear Reader,

Welcome to the third quarter newsletter.

The third quarter saw us witness the transfer and handover of power, from one government to the next, after the Supreme Court of Kenya upheld the outcome of the General Elections held on 9th August, 2022. This demonstrates the country's commendable progress as a maturing democracy as indeed we have come a long way.

In this newsletter, we have reviewed recent legislation particularly the Public Procurement and Asset Disposal (Amendment) Act 2022. We also discuss the Land Control Bill, 2022 and the Matrimonial Property Rules, 2022, which have the potential of bringing about drastic changes in the legal field if they are implemented.

The Case Highlights review a progressive and timely court decision **Anne J. Mugure & 2 others v Higher Education Loans Board (HELB)** where the Court in its decision balanced the scales of public interest against commercial interest and extended the *in duplum* rule applicable to HELB as a lender. Ultimately, the Court held that accrual of interest, penalties or fines that exceed the principal amount is unconstitutional. In the case of **Pacific Frontier Seas Ltd v Kyengo & Another** the Court addresses the issue of transfer of property where the property is vested in company shares. We also highlight the case of **Catherine Njeri Wanjiru v Machakos University,** that saw a student awarded Kshs. 700,000.00 for violation of her image rights by the University.

In light of recent happenings in matters corporate, Rodgers Mwangi takes us through factionalism in corporate entities drawing inspiration from the recent division amongst the Commissioners of the Independent Electoral and Boundaries Commission (IEBC) which almost rendered the body dysfunctional. Grishon Thuo and Nashipae Lang'at talk about corporate responsibility for human rights violations, a subject that continues to enjoy audience globally.

The article by Alfred Murithi on Mental Health and the law marks the recognition of World Suicide Prevention Day celebrated in this quarter. In honour of this day, the editorial team has also carefully curated a flowchart designed to assist you to reflect on your mental well-being at the workplace. We hope it will kindle you to mind (pun intended) and actively manage your mental well-being.

As we close the third quarter, we encourage you to give yourself the final push and finish the year strong!

Nancy Wagi

Editor

The Firm

HOW TO IMPROVE MENTAL HEALTH IN THE WORKPLACE

In commemoration of the World Suicide prevention day, celebrated on 10th September every year, here are some of the tips promoting mental health in the workplace, from our place of work to yours

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Legislative UPDATE

A number of activities have been undertaken in the legislative and regulatory sector this quarter:

PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) ACT 2022

The new law was assented to on 6th July 2022 amending the earlier Public Procurement and Asset Disposal Act, 2015 ("the Amended Act"). The objective of the Act is to provide a legal framework for prompt payment for supply of goods, works and services procured by government entities at both the national and county level.

The Amended Act introduces the function of supporting and promoting the training of persons on the government procurement process. It also provides recourse to the Public Procurement Authority ("the Authority") whenever the Authority is denied access into premises during inspection. It empowers the Authority to inspect, assess, and review contracts during investigations to ensure government procurement processes adhere to governing law. The Authority is obligated to conduct investigations including making inquiries and accessing premises at a reasonable time.

The Amended Act also introduces grounds for debarment of bidders as a way of speeding up procurement proceedings. The grounds for debarment include failure to invoke the jurisdiction of the Review Board and filing vexatious or frivolous requests.

The Amended Act also lists the responsibilities of an Accounts Officer of the Authority. Where a public entity lacks capacity to comply with requirements set out by the Authority, the Accounts Officer is mandated to seek reinforcement from the National Treasury as a way of ensuring accountability of the procurement process. The Accounts Officer is also mandated to consult the National Treasury when it comes to budget planning for the purposes of a fair and open procurement process accommodating the youth, women and persons with disabilities.

In relation to procuring at prevailing market prices, the Amended Act provides that it is the duty of the Head of Procurement to undertake a market survey in order to confirm prices that would better inform the placing of orders by procurement entities. The survey should be provided at the beginning of every financial year in conjunction with the Head of Technical Function to come up with a cost handbook to support decision making.

The Amended Act also proposes the placement of the notice inviting the public to make tender applications in at least two free to air television stations and two radio stations of nationwide reach.

It further exempts women, youth, persons with disabilities and other disadvantaged groups from paying deposit upon filing a request at the Review Board and makes a couple of recommendations on pricing when it comes to variation of contracts.

LAND CONTROL BILL 2022

The main objective of the Land Control Bill, 2022 ("the Bill") is to replace the Land Control Act, CAP 302. It proposes to regulate certain transactions in land for connected purposes and by doing so ensures that the prevalent law governing transactions relating to agricultural land is in sync with the Constitution of Kenya 2010, the Environmental and Land Court Act, 2011, the Land Registration Act, 2012 and the Land Act, 2012.

The focus of the Bill is on controlled areas such as "Agricultural Land" which refers to land which is not listed as a city or urban area and is set aside for agricultural use or activity, "Controlled Transactions". As such, it introduces land control committees whose role is reviewing and granting consent to transactions over agricultural land including settling boundary disputes.

It also exempts any land that is being transferred by way of transmission from gaining the consent of the Land Control Committee with the exception of land which after transmission will give rise to two or more parcels to be held under separate titles. Other transactions where parties do not require the consent of the Land Control Committee include those involving the national or county government, settlement funds, or trustees and a foreigner, a private company or cooperative society, but this does not mean that the consent is automatic.

MATRIMONIAL PROPERTY RULES, 2022

Chief Justice Martha Koome issued new rules and directions vide the Matrimonial Property Rules, 2022 (the "new rules") gazetted on 29th July, 2022. Under the new rules, disputes on matrimonial assets will be heard on a daily basis.

Under the new rules, it will be possible for spouses to institute civil proceedings seeking any right or relief in relation to matrimonial property during the time the marriage existed or at any time after its dissolution. At any stage of the proceedings, the court may refer all or any issues to be determined to Court annexed mediation, where whenever any settlement is reached it shall be considered part of the order issued by the Court.

Another objective that the rules seek to achieve is to incorporate alternative dispute resolution mechanisms

in resolution of matrimonial conflicts. By so doing, the court at any stage in the proceedings may refer any or all issues to be determined to mediation. Upon such referral, the dispute will be governed by existing practice and procedures for the administration of court-annexed mediation and any settlement reached by the disputing parties shall form part of the record in the proceedings and will be considered as being part of an order of the court. Failure by parties to agree on any of the issues referred to mediation will invoke the court's authority to proceed to hear and determine them.

Among the determinations that the court can make, include:

- Issuing an order for the sale of the property contested or any part of it and the division, vesting or settlement of the proceeds of sale.
- In cases where the spouses own the disputed property jointly, the court may order for such property to be vested in them in common in just shares or an alternative order vesting the property, or any part of it in either spouse.
- An occupation order allowing one spouse to occupy the matrimonial home or any other premises forming part of the matrimonial property to the exclusion of the other spouse provided the court considers existing minors or dependent children on the marriage.
- Vesting tenancy of any dwelling house in both joint tenancy and tenancy in common, in either spouse provided at the time of making the order, the spouse that the order is being made against is or was the sole tenant of the house.

These rules seek to speed up the hearing and determination of matrimonial disputes challenging ownership of matrimonial property, as well as to unlock withheld assets back into the economy.

case Highlights

This quarter we highlight the following cases:

Anne J. Mugure & 2 Others Vs HELB (Constitutional Petition E002 of 2021)

The Higher Education Loans Board ("HELB") has on multiple occasions been put on the spot for having extremely high interest rates on its loans, as well as attaching hefty penalties to defaulters.

This leads to ballooning of amounts owed to HELB which in some instances even double the initial loan amount. The Petitioners' Case was for the Court to enforce the *in duplum* rule provided for in section 44A the Banking Act.

> The *in duplum* rule provides that a lender, at the point of repayment of a loan, cannot seek to recover more than double the amount loaned plus the expenses.

The Banking Act provides a limit on the interest that can be recovered on defaulted loans. Previously, the *in duplum* rule only applied to banks and other financial institutions whose operations are governed by the Banking Act following the holding in **Desires Derive Ltd v. Britam Life Assurance Co. (K) (2016) eKLR.**

The Respondent (HELB) argued that it was neither a bank nor were its operations governed by the Banking Act, and as such the rule did not apply to its loans. Further, at the point of borrowing, the Petitioners whom HELB presumed to be familiar with the principal Act governing HELB operations, knew their obligations and what they would eventually be forced to encounter in the event of default.

The Court held that for the sake of public interest in the financial sector- particularly protecting borrowers from exploitation by lenders the *in duplum* rule applies to lending institutions other than Banks and financial institutions governed by the Banking Act such as Microfinance institutions, Co-operative Societies, Saccos and all other lenders.

The other objective of the rule was to safeguard the equity of redemption and protect borrowers from the tendency by banks to make it impossible to redeem a charged property. In this particular case, the reasoning of the court was that having the loan continue to attract interest and penalties, in perpetuity was unfair and in total violation of consumer rights safeguarded by the Constitution.

Pacific Frontier Seas Ltd v Kyengo & Another (Civil Appeal 32 of 2018) [2022] (Judgment delivered on 4th March 2022)

The issue in this case was whether the widow of the deceased who held shares in a company owning property was entitled to a share of the properties. The widow obtained a grant of letters of administration intestate and had listed as among the assets of the deceased five assets (the suit properties); three belonging to the Appellant, Pacific Frontier Seas Limited, and the 2nd Respondent, Okapi Estate Limited in the ratio 2:1. She included the properties in the application under the belief that they were properties of the deceased arising from his shareholding in the two companies.

The 2nd Respondent (Okapi Estate Limited) claimed ownership of two of the suit properties and thereafter made an application for revocation of the confirmed grant.

To resolve the claim the Respondents entered into a consent agreement, to transfer one of the suit properties to the widow, and have the other sold, with the proceeds being put in a joint account registered under the names of their respective Advocates. The consent order included property belonging to the Appellant, who had not been party to it. In addition, the Respondents agreed to transmission to the 1st Respondent of 51% of shares in the Appellant.

In determining the suit, the trial Court held that even though the suit properties were registered in the names of the Appellant and 2nd Respondent, it was in order for the 1st Respondent to include them as assets of the deceased that she was entitled to as a dependent.

The Appellate Court, however, reversed the decision of the trial Court by holding that in a company where a deceased person was a majority shareholder, the estate of the deceased shareholder was only entitled to the shares of the deceased in the company and not the company property.

Catherine Njeri Wanjiru v Machakos University Petition No. E021 of 2021 (Judgment Delivered on 3rd August 2022)

Catherine Njeri Wanjiru (the "Petitioner") sued Machakos University (the "Respondent") for using her graduation photograph to market and advertise courses the institution was offering without her consent.

According to the Petitioner, the use of her image made people assume that she was in an active partnership with the Respondent, as its Brand Ambassador. The Petitioner claimed that the use of her image had made her the subject of ridicule as the contents of the advertisement were construed by her peers and other members of the society as being basic knowledge and experience.
According to the Petitioner, the Respondent used the photograph with the aim of giving the courses it offered visibility thus getting many people to apply. By doing so, it would be able to churn massive profits off the advertisement.

Upon discovering that the Respondent was using her photo for financial gain without her consent or approval, the Petitioner wrote to the Respondent seeking an explanation for its actions. In its response, the Petitioner admitted to using the photograph citing that the publishing of images of its students in its website and across all social media platforms under its control without seeking the required consent from students was practice.

The court held that indeed the use of students' images or data for marketing or advertising purposes with the intent of gaining financially from the same was a violation of image and data rights as well as the Constitutional rights of the students to privacy and human dignity. The court went ahead to award the Petitioner Kshs. 700,000.00.

The precedence set in the case is that there is need for institutions to seek the consent and approval of their students, present and former before using their images for any activity that may benefit them financially. Going ahead to use their students' images and data without their consent or approval for any activity that would benefit them financially is a violation of existing image and data rights as well as the Constitutional rights to privacy and human dignity. The violation of such rights could attract serious penalties.

iNTERLUDE

This quarter we witnessed the second handing over of power under the Constitution of Kenya, 2010. The ceremony was conducted in accordance with the provisions of the Assumption of the Office of President Act, 2012. As a legal firm, it is only fitting we explain to you the symbols of power handed down from the outgoing President to the President-elect as was part of the Commonwealth tradition when acquiring a new head of state.

Kenyan Constitution, 2010

The Constitution symbolizes the Rule of Law. The handing over of the Constitution symbolizes that the President-elect will be bound by the Rule of Law as his authority and power is derived from the Constitution.

As the outgoing President hands over the Constitution to the President-elect, the Aide de Camp shifts side and now stands behind the President-elect (now "the President") and gives a salute signaling that the guard has changed. The Aide de camp, a member of the military, is the personal assistant of the President whose position brings honour and dignity to the President.

21 Gun Salute

The 21 Gun-Salute ceremony was borrowed from the United Kingdom (inherited during the colonial era).

The number of guns fired is designated for various ceremonies, honours, and officials according to their importance and position. The 21-gun salute is the highest military honour and is accorded to a Head of State during the swearing-in ceremony in Kenya. It is usually conducted by the Kenya Defence Forces (KDF) to welcome the new Commander-in-Chief.

The Golden Sword

The practice of handing over of the golden sword was borrowed from the Japanese Dynasty way back in 300AD and is used to signify power and authority.

After subscribing to the Oath of Office, the outgoing President hands the sword over to the President-elect (now "the President") to symbolize a shift in power and authority.

The President will be the custodian of the sword and it is usually kept at the President's office at Harambee House.

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CONTRIBUTORS' PLATFORM

Corporate Responsibility for Human Rights Violations

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Traditionally, the conceptualization of human rights was markedly more black-and-white than what exists today. The traditional view was that there were only two stakeholders when it came to human rights; the human being to whom that right accrued, and the state, upon whom the corresponding duty fell. The signing of the Universal Declaration of Human Rights in 1948 and the legal and political developments thereafter has led to what today can best be termed as universal responsibility for human rights.

What followed was a gradual awareness of the importance and the limits of the so-called human rights as more and more states began to incorporate the principles of the UDHR in local legislation. Stakeholders then began to look more critically at other players in human rights; legal persons that were not natural persons. The traditional view has been that in the case of human rights abuses by employees or directors of a corporation, the individuals concerned have been held personally liable, but even that is shifting, based on recent trends in jurisprudence.

The most obvious duty imposed upon corporate bodies in the realm of human rights are economic, social and cultural rights such as fair labour practices and consumer rights. However, recently there has been a shift towards a more critical look at the responsibility of corporations and business entities towards preventing human rights abuses. These include corporate responsibility for violations of categories of rights belonging to the natural person such as the right to life and freedom from torture, cruelty and inhumane treatment

Case Study

The world at large has been turning a keener eye to the activities of corporate entities in so far as human rights abuses are concerned. An example is the case of a well-known Kenyan affiliate of a UK based company which was in 2019 accused of several human rights abuses including 'killings, rape, gender-based violence by its guards, wanton violence and historical land injustices'.

The matter, which was ardently pursued by Non-Governmental Organizations and Human Rights Commissions, such as the Kenya Human Rights Commission, left a bad taste in the mouths of many. There were calls for the boycott of all its products, calls for a public apology and reparations for all the victims. A lawsuit filed against its parent company led to a settlement offer by the company totaling to Kshs. 694 million as well as several policy changes within the company, the basis of which will be explored shortly.

Guiding Principles

In the international law scene starting from 2013, the United Nations began efforts to come up with an instrument to lend force of law to legal sanctions to corporate entities taking the form of Trans National Corporations (TNCs). The main fear then was that the imposition of sanctions that would hinder growth of these TNCs, as well as international relations. In 2021, the UN came up with Guiding Principles on Business and Human Rights (UNGP), which provided a practical breakdown of steps that could be taken by corporations to ensure the protection of human rights.

The UN Guiding Principles require that in respecting human rights, as a foundational principle, corporations avoid causing or contributing to abuses through their activities, and seek to mitigate or prevent their occurrence. This is regardless of the size, sector or other operational variances that distinguish corporations. Corporate responsibility for human rights under the UNGP is proposed to be done through informed policy statements, approved by organizational leadership and communicated to all personnel.

The guidelines also place an obligation on businesses to carry out due diligence for human rights; that is to create

awareness of the likely impact their activities, internal and external, would have on human rights. In addition to that, in collaboration with human rights experts, corporations should identify and further assess any impact on human rights and integrate these findings with internal functions in order to plan the appropriate action.

The guidelines further place an obligation on business entities to follow upon the effectiveness of the policies, and be prepared to share the findings from such follow-up with external persons and stakeholders. This therefore provides a higher threshold of accountability for corporations. Remedies for any abuses and violations of human rights should follow what the UNGPs term as 'legitimate processes. Corporations should therefore view human rights as a legal compliance issue.

Factionalism in Corporate Governance and the Shackles of Dishonourable Custom

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In his 1776 renowned literary piece, Thomas Paine advocated that "a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defence of custom, but the tumult soon subsides. Time makes more Converts than Reason." At the time Paine made these bold revolutionary statements, he was advocating for Independence of the thirteen colonies of America from Great Britain who had ruled them for a hundred and sixty-nine years. In a persuasive prose he encouraged people from the colonies to free themselves from the shackles of dishonorable custom.

Dishonorable custom arises when individuals in governance act against the best interests of the governed. This gives rise to factions within the governing body – a phenomenon coined by Ernest Baker as 'factionalism.' Certainly, corporate governance in modern society is no exception to dishonorable custom. Corporate bodies which are governed by a board are bound to disagree. When they do, they resort to voting, what is agreeable to a majority of them carries the day. Indeed, the majority cannot always be right! So what remedies are available when the major faction of the corporate Board are dishonorable and the minor faction are guided by honorable conscience in the best interests of the stakeholders?

In light of recent happenings in the corporate world, we have seen factions rendering corporate bodies unstable and dysfunctional to the point of their inability to make simple decisions such as deciding who to legally represent them in Court where a dispute arises.

A good example of a corporate body that has experienced this stalemate is the Law Society of Kenya, whose Council in 2020 suffered the pains of factionalism that almost ground the operations of the society to a halt. While this might have been the direst of eventualities - to have a non-operational society, the society still suffered negative publicity and its conduct injured the sanctity and sobriety of the legal profession. Case in point, there was a time when two advocates appeared in court purporting to act for the Society both acting under different directions.

In the just concluded 2022 General Elections, a similar show of factionalism was manifest in the Independent and Boundaries Commission (IEBC). The seven commissioners whose mandate is to unanimously support the Commission's operations or better still speak in one voice in the light of disagreement, could not seem to agree on the verifiability of the election results. It was a dishonorable show considering how the Commission's internal wrangles and dysfunctionality ended up being public fodder. Even worse is that those massively affected by such dysfunctionality were Kenyan citizens. Evidently, such conduct is against the principles of Leadership and Integrity of Chapter 6 of the Constitution of Kenya 2010 and Mwongozo Code of Governance for State Corporations.

Undoubtedly, factionalism also occurs in boards of corporate bodies in the private sector.One may think the obvious response for such a scenario would be to seek redress in a court of Law – which is governed by part XI of the Companies Act, 2015. However, Courts have in the past avoided delving in affairs of Boards employed by private entities. In the aforesaid Law Society of Kenya matter, the court held that, for the court to legitimize which faction had the appropriate authority to represent the society, would be to fan the flames of disunity engulfing the body. Similarly, in the IEBC matter, the Supreme Court held that it would not delve into the internal affairs of the commission – and proceeded to strike out the Notice of Appointment filed subsequently after the first one.

> When a board finds itself in such murky waters, what is their recourse?

One of the solutions is shifting the focus to the personal integrity of the individual Board members. For the public sector, the constitution provides for principles of leadership and integrity. Hence, one may assert that by incorporating the principles of leadership and integrity under the company's articles of association, the board will be bound by these regulations.

One may ask therefore, upon incorporating these principles, how can a corporate body ensure the board adheres strictly to these principles? This is a paramount question as seen

in practice, the boards of corporate bodies make decisions on a basis of unanimity or that of the majority. How do you check a majority that acts contrary to the interest of the shareholders? The answer therein lies in a 'shareholder interest clause'.

A 'Shareholder interest clause' in the articles of association will ensure the board members discharge their duties in accordance to the best interests of the stakeholders. This is to mean that where the resolution of the majority faction of the board is contrary to the best interest of the stakeholders, such a resolution ought to be declared invalid.

Hence, this calls for the formation of a delegates committee by the stakeholders who will act as the Board's *watchdog*. The primary role would be to review the board's resolutions and assess whether such resolutions are in line with the best interests of the stakeholders. Where a decision is found to be contrary to the aforesaid interest, then the Board would have to call a meeting and review its decision.

In conclusion therefore, it is paramount for a company or any other body corporate to review the Constitution with the goal of ensuring the veto status accorded to the majority of a Board does not go unchecked to the detriment of the shareholders. As Thomas Paine put it, "... a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defence of Custom but the tumult soon subsides. Time makes more Converts than Reason.

MENTAL HEALTH AND THE LAW

> "Mental illness is nothing to be ashamed of but stigma and bias shame us all".
>
> ~ Former United States President Bill Clinton

The World Health Organization (WHO) defines mental health as a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community. As such, WHO accords mental health the status of a basic human right critical to personal, community and social-economic development.

Equally, the supreme law of our Republic, the Constitution of Kenya, 2010, recognizes the fundamental right of protection from direct or indirect discrimination on the basis of health status or disability. Of note, the term 'disability' is described in the Constitution as 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities'. Accordingly, the Constitution obligates the State as well as each and every individual to observe and respect the right to equality and fundamental freedom from discrimination.

From the onset, it is vital to point out, appreciate and fully understand that mental health conditions are not simply items one chooses from a confectionery. They are rather a reflection of various random determinants be it psychological, environmental or biological determinants. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR), for instance, lists over 200 disorders which include attention-deficit/hyperactivity disorder (ADHD), sleep-wake disorders, posttraumatic stress disorder (PTSD) and prolonged grief disorder.

The World Health Organisation, on the other hand, has published information to the effect of highlighting that 1 in every 8 people in the world live with a mental disorder with anxiety and depressive disorders being the most common. The year 2020 has further been characterised by a rise in mental health issues and the number of people living with anxiety and depressive disorders owing to the COVID-19 pandemic; the workplace is not alien to this phenomenon.

There then arises two primary questions, the first being: what should an employer be aware of in dealing with mental health at work?

Considering the safeguards established by the Constitution, practices at the workplace should be implemented in a manner that takes cognizance of the mental welfare of employees. This includes policies that recognize and protect prospective and current employees from discrimination, direct or indirect, on the basis of their mental health status. Key to note is that employers ought not feel legally burdened in formulating such policies. It is a matter of being humane; human rights are inherent, inalienable – they exist because we exist; they cannot be ripped apart from the fabric of our very existence. As such, the law cannot create human rights, it can only recognize them.

Kenya has a number of legislations, some already mentioned above, that seek to address mental health conditions, as a disability, and employment. They include: -

i) Employment Act, 2007

Freedom from Discrimination (Sec.5)	An employer is required to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
	An employer is prohibited from discriminating, directly or indirectly, against an employee or prospective employee or harassing 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, marital status or HIV status; Freedom b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
	Where discrimination is alleged, the employer bears the burden of proving that the discrimination did not take place as alleged and that the discriminatory act/ omission is not based on any of the grounds aforesaid.

Reasons for Termination or Discipline (Sec.46)	An employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty.

ii) Persons with Disabilities Act, 2003

Employment (Sec. 12)	Persons with disabilities should not be denied access to opportunities for suitable employment.
	A qualified employee with a disability is subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees.
	An employee with a disability is entitled to exemption from tax on all income accruing from their employment.
Apprenticeship (Sec.14)	Persons with disabilities are eligible for engagement as apprentices or learners where their disability is not such as to impede their performance in particular occupations for periods for which they are hired.
Discrimination (Sec.15)	Employers should not discriminate persons with disabilities in relation to: - a. the advertisement of employment; b. the recruitment for employment; c. the creation, classification or abolition of posts; d. the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; e. the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; f. the provision of facilities related to or connected with employment; or g. any other matter related to employment.
Incentives to Employers (Sec. 16)	Private employers who engage a person with a disability with the required skills or qualifications either as a regular employee, apprentice or learner are entitled to apply for a deduction from their taxable income equivalent to 25% of the total amount paid as salary and wages to such employee.
	Private employers who improve or modify their physical facilities or avail special services in order to provide reasonable accommodation for employees with disabilities are entitled to apply for additional deductions from their net taxable income equivalent to 50% of the direct costs of the improvements, modifications or special service

Notwithstanding the foregoing, an employer is not deemed to have discriminated against an employee on the basis of a disability if, inter alia, the disability in question is a relevant consideration to the job requirements or where an employer cannot reasonably be expected to provide the required special facilities or modifications.

The legislature has also proposed a law - the Employment (Amendment) Bill, 2021 - that seeks to address employee burnout and provide for employees' right to disconnect from their employer outside of working hours.

Based on the foregoing, though the law can be developed further, there is clear recognition of the fundamental freedom from discrimination on the basis of mental health conditions. Consequently, an employer can/ ought to develop and practice a non-discrimination policy, mental health and wellbeing policy as well as avail special services or modify physical facilities at the work place. Additionally, recognition and upholding of employees' rights, such as the right to annual leave, has a substantial impact on the mental welfare of employees.

The second question that arises is: how should an employer act when the mental health of a member of staff affects the latter's ability to carry out their day-to-day duties?

Mental health conditions are likely to affect job performance and, in some cases, physical capacity. In the event an employer considers termination of an employee on the basis of incapacity, substantive justice and procedural fairness act as the guiding light.

Section 41 of the Employment Act, 2007 requires an employer to explain to an employee in a language they understand the reasons for consideration of termination when the grounds are misconduct, poor performance or physical incapacity. The employee on the other hand is entitled to make representations relating to the reasons provided by the employer including having a representative present during the session with the employer.

In the case of Gichuru v Package Insurance Brokers Ltd the Court reiterated that a claim of dismissal on medical grounds should be preceded by medical assessments leading the employer to conclude that an employee was incapable of performing their duties.

A medical assessment alone however is not sufficient. The Supreme Court in the Gichuru case referred to the South African case of Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and Others where it was stated that:
"An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee's recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to "investigate the extent of the incapacity or the injury... (and).... all the possible alternatives short of dismissal."

In their discussion on the above citation, the Supreme Court indicated that dismissal should be the last resort after the employer has exploited other possible alternatives to accommodate the employee. The decision to dismiss should only be recommended when accommodation of the employee occasions the employer unjustified hardship.

An employer further ought not to be oblivious of their employees' state of mental health. In Christopher Mutinda Katitu v Republic, the appellant was found to have proved

that he developed PTSD owing to the tours of duty in the war zone in Somalia under the auspices of AMISOM and Operation Linda Nchi. Justice Kimaru categorically stated that prior to the appellant being further deployed to Garissa, the appellant's superiors should have noticed that the appellant was not in a position to be sent in an operation zone in his mental condition. Justice Kimaru further averred: -

"The Appellant's failure to return to work should have been considered by the Kenya Defence Forces in the context of his mental health. Again, tragically, instead of the Appellant's medical problem being resolved by medical intervention, a decision was made to look at his absence from work as a criminal matter."

To accord an employee procedural fairness in a case of mental health therefore, there are two approaches depending on the assessment made by the employer. First, where a medical assessment has been conducted rendering an employee not fit for duty, the employer ought to explore supportive measures including recommended professional treatment and allocation of lesser duties to allow the employee recover from their state. This could involve aspects of paid medical leave to relax before resuming duties. In coming up with remedial measures, the employer should involve the employee in the decision making in order to arrive at the best course of action.

Secondly, where alternatives fail, the employer should present a notice to the employee, accord them a fair hearing where the employee can make responses and have their representative present; minutes of such hearing should be signed by the employee. Thereafter the employer/ subject committee ought to retire, consider the employee's representations and finally make a decision.

In conclusion, substantive justice and procedural fairness is necessary for employers to prevent or justify future claims of unfair termination or discrimination on the basis of mental health status.

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Acknowledgements

The Editorial team would like to express its sincere gratitude to all those members of the Firm who, in one way or another, contributed to the conception, preparation and eventual production of this Newsletter. The dedication and input of the writers and contributors is appreciated and we look forward to continued support in the issues to follow.

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