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Legal Briefs

The Firm

Legislative Updates

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EDITOR'S NOTE

Dear Reader,

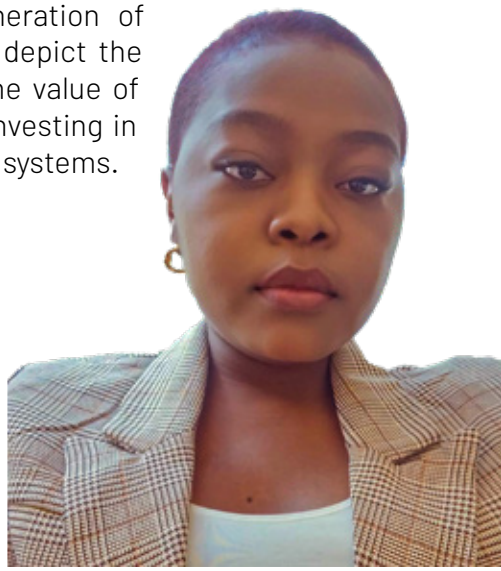
Welcome to our Q2 2025 edition a compact but powerful issue shaped by a season of legislative momentum, consequential court rulings and fresh thinking on workplace compassion and technology in dispute resolution.

This quarter we focus on practical lawyering in an era of rapid regulatory change. To mention but a few, the Finance Act 2025 and the Anti-Money-Laundering and Combating of Terrorism Financing (Amendment) Act are already reshaping tax policy and compliance obligations across banking, fintech and non-financial sectors. Our Legislative Update breaks down these developments into clear action points so you can move from headlines to a compliance checklist without delay.

In our Case Highlights section we unpack two decisions with immediate practical effect. First, we delve into how the Employment and Labour Relations Court handled a dispute on hiring procedures in **Moi Teaching and Referral Hospital v Magare Gikenyi & Others**, briefly speaking, the judges clarified which court had jurisdiction to entertain disputes on matters recruitment and who has the right to lodge such complaints. Second, we cover the High Court's equality ruling in **Dennis Kivuti Mungai v Attorney General,** which changes how succession (inheritance) rules apply to men whose wives have died. Both decisions have made the proper forum quite clear and how questions of fairness and equality can affect the outcome. Last but not least, they also offer practical guidance for lawyers on what remedies to seek.

Our Contributors' Platform brings two timely features: Winfred Mutinda offers a humane, legally grounded take on maternity, paternity and bereavement leave, a practical guide for employers and a call for sensible reform. We also carry a thoughtful explainer on the Chartered Institute of Arbitrators (CIArb) AI Guideline and what it means for arbitration practitioners and parties who opt disputes through arbitration: how to use AI safely, what to disclose and why tribunals must endeavor to preserve human adjudication. Finally, we celebrate the next generation of legal talent. Our interns' reflections depict the benefits of hands-on training and the value of mentoring; a simple reminder that investing in people is as important as investing in systems.

Enjoy the issue.



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The Firm

Introduction

Welcome to this month's newsletter! We're excited to spotlight our amazing interns Mr. John Murimi, a student from JKUAT Law School, Ms. Mavis Namabii, a student from CUEA Law School and Mr. Zadock Nyakawa, from KU Law School who recently joined us for a work-based learning program. Over the past few weeks, they have immersed themselves in our firm's culture, gaining hands-on experience and bringing fresh perspective to our projects. In this edition, we share their reflections and insights, highlighting the valuable lessons learned and the innovative ideas they brought to the table. Join us in celebrating their contributions and the enriching experience they've had with us!

John's Experience

My time at the Firm has been particularly insightful; it has taught me about the work culture and the activities that take place on a day-to-day basis. I have gained a clear understanding of the kinds of tasks performed around the office, which has helped me form a better idea of the area of law I would like to specialize in the future. I have had the privilege of working alongside some of the best professionals in the country, who have taught me so much about the practice of law and what it has to offer. As an intern at the firm, I am more than satisfied with the new knowledge and skills I have acquired, and I have developed a newfound passion for a future in law.

Mavis's Experience

Interning at NR & Co has been an experience of immeasurable value to me. Being here has helped me gain a much more realistic understanding of the law and its procedures through hands on learning. The firm's focus on doing the most thorough work possible to the best of one's ability, values of always being open to learning something new and there being no limit to the amount of knowledge one can acquire will stay with me going forward as I pursue a career in law. I am thankful for the opportunity to contribute to the cases directly and to work with highly experienced advocates and staff that were all so kind and open to sharing their knowledge.

Zadock's Experience

My time at the Firm has been amazing. I sincerely appreciate this opportunity and I'll be applying everything I have learnt here to both my academic and professional endeavors moving forward.

As we continue to build on these exciting developments, we remain committed to upholding the values of professionalism, integrity, and excellence in everything we do. We look forward to an even more successful and impactful 2025, with many more milestones to celebrate as a team.
Stay tuned for more updates in the coming months. Thank you for your continued trust and support!

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Legislative UPDATES

In this issue, we highlight the recent laws and guidelines or directives passed or issued during the second quarter including the Finance Act 2025.

THE FINANCE ACT, 2025 KEY TAX DEVELOPMENTS

The **Finance Act, 2025,** assented into law on **26th June 2025,** introduces modest yet impactful changes to Kenya's tax framework. The majority of the provisions took effect on **1st July 2025**, with select provisions scheduled for implementation beginning 1st January 2026. implementation. Below are the notable updates:
Key Provisions

1. Redefined "Digital Lender"

The act narrows the definition to exclude regulated financial institutions such as Banks, SACCOs and Microfinance Institutions while expanding the category to capture persons offering credit where lending may be incidental to their primary business such as marketplace buy-now-pay-later providers. This broadens the tax and regulatory net on fintech-style lenders.

2. Expanded Significant Economic Presence Tax (SEPT)

The scope of SEPT now covers persons earning income from services provided "over the internet or an electronic network including through a digital marketplace," capturing service providers operating online even where no digital marketplace per se is used.

3. Advance Pricing Systems (APA's)

From 1st January 2026, taxpayers may enter into APAs with the Commissioner for pre-approval of transfer pricing methodologies for related-party transactions — a tool intended to reduce transfer-pricing uncertainty resolution mechanisms.

4. Time Limit on Carry-Forward of Tax Losses

The Act caps the period for carrying forward tax losses to five years, subject to limited extensions with Cabinet Secretary approval. This replaces the prior indefinite carry-forward regime. Regulatory authorities will impose penalties for non-compliance.

5. Deductibility of Interest for Residential Construction

The definition of deductible interest for individuals has been expanded to include interest on loans used for construction of residential premises, in addition to purchase and improvement.

6. Increased Per Diem (Travel & Subsistence) Tax-Free Threshold

The tax-free per diem limit has been raised substantially noting an increase recognizing cost-of-living pressures. This affects fringe-benefit calculations and payroll withholding.

7. Targeted Stamp-Duty Exemptions & Settlement Conditions

New exemptions for internal corporate reorganizations (transfers proportionate to shareholdings and certain intra-group share transfers), and clarifications that KRA will only lift property encumbrances when payment plans are fully satisfied; transfers under such settled plans may be exempt from stamp duty.

Implications for Stakeholders

- **Banks & Regulated Financial Institutions:** Likely excluded from the digital-lender bracket, but banks must review product wrappers to ensure incidental lending features do not trigger different treatment. Review product documentation for marketplace lending links.
- **FinTech's, Digital Lenders & Marketplaces:** Many fintech's (BNPL providers, platform lenders, and internet service providers offering credit) may now fall squarely within the digital-lender scope need to prepare for a different tax treatment and potential excise/levy exposure.

Reassess product tax treatment and pricing.

- **Multinationals & Cross-Border Service Providers:** SEPT expansion increases risk of Kenyan tax exposure for remote service providers. Expect the KRA to demand local filings; groups must model potential Kenyan taxable presence and update TP documentation.
- **Corporate Tax & Treasury Teams:** The 5-year loss carry-forward cap affects forecasted tax liabilities, deferred tax calculations and M&A models. Companies with historical losses should run sensitivity analyses; seek Cabinet Secretary waivers where justified.
- **Real Estate & Corporate Restructuring Practitioners:** Stamp duty relief for internal reorganizations (subject to conditions) creates transactional planning opportunities for group reorganizations. However, KRA's insistence on full settlement under payment plans before lifting encumbrances requires careful sequencing of restructures.
- **Payroll & HR Teams:** The raised per-diem threshold will change gross-to-net calculations and may reduce tax withholding for staff travelling; payroll systems must be updated for July 2025 payroll runs.
- **Tax Advisors & Compliance Teams:** Prepare to deploy APAs from Jan 2026 for high-risk related-party transactions; update transfer-pricing policies and evidence. Also prepare clients for tighter data/information requests from KRA under SEPT enforcement.

Potential Challenges

- **Ambiguity around "Incidental" Lending and Scope Creep:** Product structures where lending is ancillary such as buy-now-pay-later embedded in e-commerce, may be captured unexpectedly.
- **Implementation Timing & Systems Readiness:** Most changes took effect on 1st July 2025. Firms with legacy ERP/Tax engines may face compressed testing window for invoicing, withholding, VAT/excise treatment and payroll updates.
- **SEPT Compliance and Dispute Risk:** Wider SEPT scope invites double taxation risk and aggressive source-based assertions by KRA. Expect cross-border disputes if treaty reliefs or apportionment methodologies are not clearly applied.
- **Revenue Uncertainty from Loss-Carry Limit:** Companies relying on historical tax loss utilization to reduce near-term taxes may see higher cash tax and this affects valuations and cashflow planning. Seeking Cabinet Secretary approval is possible but uncertain in outcome.

Conclusion

The Finance Act, 2025 is quite pragmatic since it tightens carry-forward protections, brings more digital economic activity within Kenya's tax net, and introduces taxpayer-friendly tools such as APAs. For financial institutions and corporate taxpayers, the immediate priorities are:

- To verify product positioning against the revised "digital lender" and SEPT rules;
- Re-run tax and cash-flow models in light of the five-year loss carry-forward cap;
- To prepare APA pipelines for material cross-border transactions ahead of January 2026; and
- To update payroll and stamp-duty processes to reflect the new thresholds and exemptions. Expect a short window of operational pressure as KRA/Treasury publish the implementing guidance that will determine practical compliance paths.

THE ANTI-MONEY LAUNDERING AND COMBATING OF TERRORISM FINANCING LAWS (AMENDMENT) BILL, 2025

On 17th June 2025, the National Assembly passed the **Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2025,** aimed at strengthening financial oversight, enhancing compliance, and aligning Kenya's regulatory framework with international standards. The Act expands the regulatory authority, increase penalties for non-compliance, and imposes stricter reporting obligations across multiple sectors.

Expanded Regulatory Oversight and Compliance Obligations

The Act significantly strengthens the powers of supervisors and expands the institutional architecture for Anti-Money Laundering/ Combating the Financing of Terrorism/Financial Action Task Force (AML/CFT/FATF) enforcement. It expressly empowers supervisory bodies

(including sector regulators and supervisory institutes) to vet license applicants, conduct on-site inspections, compel production of documents, undertake off-site surveillance, and apply consolidated supervision over members and reporting institutions. These powers are wider than before and are intended to improve proactive detection and oversight.

The definition and scope of reporting institutions (often referred to as **Designated Non-Financial Businesses and Professions DNFBPs)** are broadened in places, bringing additional sectors such as real estate, dealers in precious metals and stones, some professional bodies and fintech service providers, explicitly within the reporting, KYC (Know-Your-Customer) and record-keeping net. The consequence is a materially larger compliance population obliged to file suspicious transaction reports (STRs) and maintain enhanced due diligence (EDD) for high-risk customers.

Stricter Penalties for Non-Compliance

The Act raises the **administrative and civil penalties** for failure to comply with AML/CFT obligations. For legal persons (companies and similar entities) the statutory cap on fines for specified violations is increased (text provides ceilings up to KES 5 million for certain breaches), while natural persons (directors, officers or individuals) face separate monetary penalties (and potential daily penalties for continuing breaches). The Act also gives supervisors explicit power to impose administrative sanctions as part of on-site enforcement. The legislative emphasis on express penalty amounts and on daily penalties for continuing breaches is intended to create stronger deterrence and to support a visible enforcement record to satisfy international peers (notably the FATF).

Risk-Based Monitoring and Sector-Specific Reforms

The Act formalizes a risk-based approach to supervision by requiring supervisors to tailor oversight intensity according to sector risk profiles. Sectors identified as higher risk for example, real estate, dealers in precious metals, certain fintech activities and cross-border remittance services, will face more frequent inspections, stricter CDD/EDD requirements and higher reporting expectations. This is consistent with FATF guidance recommending proportionality and focused resource allocation.

Implementation Challenges and Regulatory Risks

The Capacity & Cost for Smaller Reporting Institutions (DNFBPs) and SMEs will face substantial compliance costs systems upgrades, staff training, and the administrative burden of record-keeping and STR filing. Smaller firms may struggle to resource these obligations without targeted capacity building support. This raises short-term risk of non-compliance and enforcement focus on high numbers of small entities. The Act expands information-sharing powers among agencies and supervisors, which improves operational effectiveness but also raises data protection and privacy questions. Regulators and reporting institutions must balance mandatory reporting and data sharing with obligations under the Data Protection Act (Kenya), careful operational protocols and DPA (Data Protection Act) compliant Memoranda of Understanding (MoUs) will be necessary.

Conclusion

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2025 is a firm step toward tighter, risk-focused supervision and stronger enforcement in Kenya's fight against money laundering, terrorism financing and proliferation financing. It aligns statutory powers with international standards (FATF) by expanding supervisory authority, clarifying reporting obligations and raising penalties. However, successful implementation will depend on (a) prompt, clear implementing regulations and supervisory guidance, (b) targeted capacity-building for DNFBPs and smaller institutions, (c) well-crafted data-sharing protocols that respect the Data Protection Act, and (d) demonstrable and proportionate enforcement that balances deterrence with sectoral viability.

case Highlights

In this segment, we highlight two decided cases, looking into the jurisprudence set by the apex courts in:

Moi Teaching and Referral Hospital v Dr. Magare Gikenyi & Others

On March 6th, 2024, the Employment and Labour Relations Court (ELRC) addressed a significant jurisdictional question in ***Moi Teaching and Referral Hospital v Dr. Magare Gikenyi & Others*** (ELRC Petition No. E002 of 2023), reaffirming the position that pre-employment processes, including recruitment and shortlisting, do not fall within the purview of the ELRC unless there is a concluded contract of employment.

The case arose from a petition filed by Dr. Magare Gikenyi challenging the recruitment process for the Chief Executive Officer of Moi Teaching and Referral Hospital. He alleged irregularities and constitutional violations in the manner the recruitment was conducted and sought orders halting the process. The respondents, including the Public Service Commission and the Hospital, raised a preliminary objection asserting that the court lacked jurisdiction over the matter, as no employer-employee relationship had been formed.

Issues

1. Whether the ELRC had jurisdiction to entertain disputes relating to pre-employment processes.
2. Whether constitutional claims can be invoked to sustain jurisdiction in employment-related matters.
3. Whether Dr. Gikenyi had locus standi in filing the petition.

Justice Byram Ongaya, in a well-reasoned ruling, emphasized that jurisdiction is conferred by law and cannot be inferred merely because constitutional rights are pleaded. The court found that since the petition revolved around a recruitment process that had not yet culminated in an employment contract, the ELRC had no jurisdiction to determine the matter.

The Court relied on previous decisions of the Court of Appeal and the Supreme Court which draw a clear distinction between pre-employment processes (which are administrative in nature) and post-employment relationships (which the ELRC is empowered to adjudicate).

On the issue of ***locus standi,*** the court observed that Dr. Gikenyi had not demonstrated a personal interest or direct stake in the recruitment, thus failing the test for standing under Articles 22 and 258 of the Constitution. It is important to note that the Constitution through the Articles allows people to bring public-interest and constitutional claims. However, those broad rights do not mean any court will hear any complaint. Courts still expect a clear explanation of **how** the person bringing the case is connected to the matter. Because Dr. Gikenyi did not show a clear personal connection to the recruitment, the court held he lacked the necessary standing in that forum.

Conclusion & Implications

The Court struck out the petition for want of jurisdiction. The decision reinforces the position that the ELRC's jurisdiction is limited to existing employment relationships and does not extend to administrative or policy-based recruitment actions unless an employment contract has been concluded.

The ruling gives useful guidance to public bodies and lawyers who handle employment disputes, showing that:

- Claims based on perceived irregularities in job advertisements, shortlisting, or interview processes must be channelled through appropriate administrative law mechanisms, not the ELRC.
- Pleading constitutional violations does not automatically clothe the ELRC with jurisdiction.
- Courts will require a demonstrable personal interest before granting standing in employment matters.

Dennis Kivuti Mungai v Attorney General (Petition E416 of 2023) [2025] KEHC 8544 (KLR)

In a landmark decision rendered on 19th June 2025, the High Court, sitting in Nairobi, declared **Section 29(c)** of the Law of Succession Act unconstitutional for its **discriminatory treatment of widowers.** The petition was filed by **Dennis Kivuti Mungai,** who challenged the requirement that a **husband must prove dependency on his deceased wife** to be deemed a dependent a burden not imposed on widows in equivalent circumstances.

The petitioner argued that this provision violated **Articles 27 and 45(3)** of the Constitution, which guarantee equality before the law and equal rights in marriage.

Facts

The petitioner, **Dennis Kivuti Mungai,** was the customary husband of the late **Caroline Wawira Njagi**, with whom he had two children. Following her passing, burial plans were undertaken by another partner without involving the petitioner, despite Caroline's expressed wishes to be buried at her matrimonial home. Mungai moved to the **Mavoko Law Courts** and obtained orders to bury his wife as her lawful husband.

However, he faced a further legal obstacle: **Section 29(c) of the Law of Succession Act** required him, as a widower, to prove he was financially dependent on his wife to qualify as a "dependant" entitled to inherit. By contrast, **no such requirement exists for widows under Section 29(a).** He filed a constitutional petition challenging the constitutionality of that provision, citing gender-based discrimination.

Issues

The High Court considered the following issues for determination;

1. Whether **Section 29(c)** of the Law of Succession Act violates the Constitution by treating husbands and wives unequally.
2. Whether the doctrine of **constitutional avoidance** applied, considering that the underlying dispute involved estate administration.
3. Whether the petitioner was obligated to **petition Parliament** before approaching the courts.
4. Whether the **Attorney Genera**l was the proper respondent in such a petition.
5. Whether the petitioner was entitled to the reliefs sought, including a mandatory injunction requiring legislative reform.

Analysis

The High Court treated this case as a direct challenge to a law, not a routine estate dispute, so it had authority to test whether Section 29(c) of the Law of Succession Act complied with the Constitution (Article 165). Although citizens may petition Parliament under Article 119 to ask for law reform, the Court made clear that petitioning Parliament is not a mandatory first step. Going to court for constitutional review is separate and

on the substance, the Court found Section 29(c) discriminatory: it required widowers to prove they were financially dependent on their deceased wives to qualify as "dependants," while widows are automatically treated as dependants under Section 29(a). That gendered distinction failed the equality test in Articles 27(4) (non-discrimination) and 45(3) (equality in marriage).

The Attorney General was properly joined as a respondent because the petition challenged the validity of a statute. Respecting separation of powers, the Court **declared** the offending part of Section 29(c) unconstitutional (a declaratory order) but did not order the Executive to draft new legislation.

The Practical effect is that widowers will no longer routinely be forced to prove dependency to inherit from their late wives; estate advisers, legislators and practitioners should update advice, documents and watch for any parliamentary amendments or appeals.

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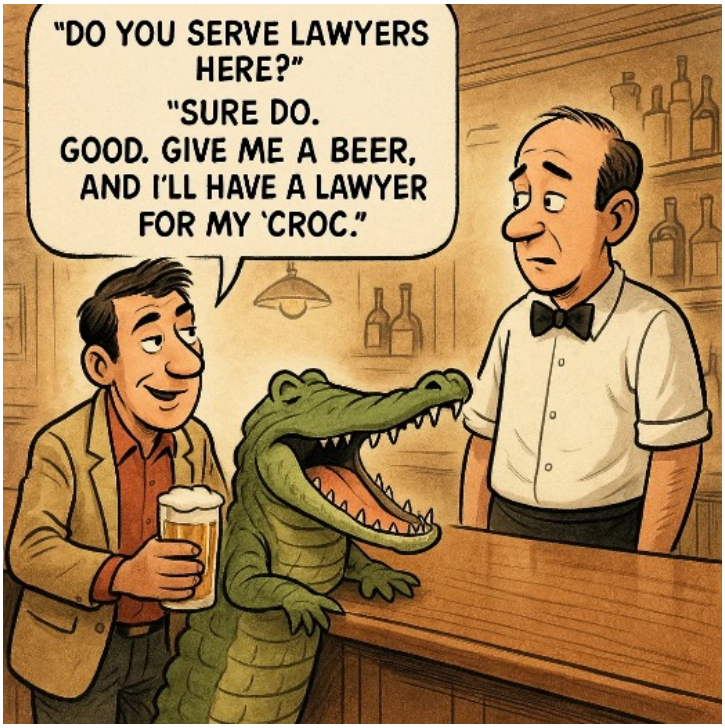
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Why don't you put some posters
Can't. I'd have to bill myself for advertising.

CONTRIBUTORS' PLATFORM

WHEN TRAGEDY STRIKES: REIMAGINING MATERNITY LEAVE FOR BEREAVED MOTHERS IN KENYA - by Winfred Mutinda

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Introduction

When pregnancy ends not in the expected welcome of a newborn but in miscarriage, stillbirth or other perinatal loss, the physical and psychological impacts on a mother (and her family) are profound. Current Kenyan law guarantees maternity leave and certain related protections, yet it is silent or equivocal on bereavement entitlements specific to pregnancy loss. This article critically examines the statutory framework under the Employment Act, 2007 and related instruments; analyses judicial treatment of parental leave questions; compares international models for parental bereavement leave; and proposes concrete legislative and workplace reforms to ensure bereaved mothers in Kenya receive fair, compassionate, and legally protected time to recover and grieve.

The Current Legal Framework in Kenya

1. Maternity and paternity leave under the Employment Act Section 29 of the Employment Act, 2007 grants female employees three (3) months (90 calendar days) of **maternity leave with full pay**, and a male employee is entitled to **two (2) weeks paternity leave with full pay**. The Act requires prior notice of intention to take leave and permits employers to request a medical certificate.

The Employment Act also provides sick-leave entitlements (section 30) and contemplates that maternity leave may be extended if, for example, a female employee proceeds on sick leave immediately after maternity leave. However**, the statute does not expressly provide a separate, named entitlement for bereavement arising from miscarriage or stillbirth;** in practice employees rely on sick leave, compassionate leave (where offered by employers), annual leave, or unpaid leave. Compassionate leave is generally not statutorily defined or standardized in the Act and is often left to employer policy or collective agreements.

The Human and Legal Problem: Why Current Arrangements are Inadequate

1. Physical and Psychological Realities of Pregnancy Loss

Miscarriage and stillbirth commonly entail significant physical recovery needs such as post-surgical care after miscarriage and psychological trauma requiring time for counselling and healing. A one-size-fits-all reliance on general sick leave or ad hoc compassionate leave does not reliably address those needs, particularly for working mothers in the formal sector without clear employer policies, and for women in the informal sector who lack statutory protection in practice. Medical and advocacy organizations emphasize the need for dedicated support measures for bereaved parents.

2. Legal Equality Concerns

When parental loss is treated inconsistently or left to discretionary employer policy, inequalities arise. A statutory gap may leave bereaved mothers vulnerable to discrimination when they seek time off, or push them to use annual leave or unpaid leave (with consequent financial harm). **Article 27 of the Constitution of Kenya** guarantees equality and non-discrimination; the question is whether

a legal regime that grants three months maternity leave but does not expressly protect time off for miscarriage or stillbirth creates an equality deficit. Our Courts, however, have recognized differences in parental leave durations as potentially justified by the differing physiological needs of mothers and fathers as provided in ***Benjamin v Ministry of Labour & 5 others (Petition E001 of 2022).***

Judicial Posture: The Benjamin Litigation and its Import

In ***Benjamin v Ministry of Labour & 5 others (Petition E001 of 2022)*** the petitioner challenged Section 29 of the Employment Act as discriminatory for granting different durations of leave to male and female employees. The High Court (Magare Gikenyi J). dismissed the petition, holding that the differentiation was justifiable because maternity leave responds to specific maternal physiological and health needs distinct from paternity leave. The judgment therefore highlights two legal realities:

a) The Kenyan judiciary recognizes the special health-based justification for maternity leave; and
b) Mere differential duration between maternity and paternity leave is not per se unconstitutional. Importantly, t**he case does not address whether miscarriage or stillbirth should attract a specific statutory entitlement;** thus, the gap persists.

Comparative Models: Parental Bereavement Leave Abroad

Several jurisdictions have moved to create statutory parental bereavement entitlements that recognise the unique harms of child loss and stillbirth:

• **United Kingdom:** The Parental Bereavement (Leave and Pay) Act 2018 (often called "Jack's Law") grants parents two weeks' statutory parental bereavement leave where a child dies under 18 or a stillbirth occurs after 24 weeks' gestation; parents may take the leave as a single block or two separate blocks within 56 weeks. This model explicitly recognises stillbirth as the predicate for entitlement.

• Other jurisdictions and campaigns, in recent UK discussions extending leave to cover miscarriages before 24 weeks reflect growing international momentum to legislate compassionate, predictable time off for pregnancy loss. These comparative models show workable templates for statutory entitlements that combine dignity, predictability and legal protection.

Policy Arguments For A Dedicated Bereavement Maternity Entitlement in Kenya

1. Medical and Psychological Recovery- Statutory time ensures mothers can access medical follow-up and counselling without financial penalty or fear of job loss.
2. Equality and Workplace Dignity- A dedicated entitlement reduces workplace arbitrariness and protects bereaved mothers (and partners) from informal denial of leave or retaliatory discrimination.
3. Public Health and Social Welfare- Supportive leave policies reduce longer-term health costs (mental health, maternal morbidity) and stabilize family welfare during recovery.
4. Enforceability and Clarity- A statutory entitlement with clear procedural requirements (notice, medical certificate thresholds, protection from dismissal) reduces litigation and the ad hoc allocation of compassionate leave. Parliamentary and Commission discussions in Kenya (including KLRC drafts and parliamentary debates) have flagged the need for more explicit protections.

Addressing Counterarguments

1. Cost to employers: Employers may cite fiscal costs. However, evidence from jurisdictions that have implemented bereavement leave suggests benefits through improved retention and fewer instances of employees coming to work but being too unwell or distracted to be productive, and lower long-term health costs. Moreover, a statutory minimum can be calibrated (e.g., two weeks) to balance compassion and fiscal impact.
2. Difficulty in Verification and abuse: The risk of abuse is mitigable by proportionate documentation requirements and HR controls. Empathic practice and workplace culture also reduce gaming of the system.

Conclusion

Kenya's Employment Act already establishes commendable protections which is notably three months paid maternity leave and one-month pre-adoptive leave. However, the law fails to expressly and consistently protect women who experience pregnancy loss. A dedicated, statutory bereavement entitlement for miscarriage and stillbirth, combined with employer policies offering paid leave, counselling and job protection would deliver compassionate, equitable, and predictable outcomes for bereaved mothers and families. In ***Benjamin v Ministry of Labour & 5 others,*** the decision affirms that the legislature may distinguish maternity from paternity leave based on health needs, but it does not foreclose targeted statutory remedies for pregnancy loss. The time is right for Kenya to reimagine parental leave to include grief-responsive protections that reflect medical evidence, international best practice, and fundamental human dignity.

AI-EVOLUTION IN ARBITRATION: THE NEW CHARTERED INSTITUTE OF ARBITRATORS (CIARB) GUIDELINES- by Edward Mwangi

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Introduction- Situating AI within Arbitral Process

Artificial intelligence (AI) is changing the way arbitration and dispute resolution work. It's not just a passing trend or a cosmetic upgrade, it is reshaping how facts are analysed, how information is shared, and even how tribunals make decisions. The Chartered Institute of Arbitrators (CIArb) recently released a set of guidelines to help practitioners and arbitrators use AI responsibly. These guidelines aim to strike a balance between two goals: harnessing the efficiency of new technology and protecting the key values of arbitration, such as fairness, party autonomy (the freedom of parties to shape their process), and the enforceability of awards.

The guidelines are positioned within existing legal frameworks like the **UNCITRAL Model Law on International Commercial Arbitration** (a widely adopted legal template that many countries base their arbitration laws on), national arbitration statutes, and the **1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.** Together, these frameworks create the international "rules of the game" for arbitration.

The purpose of this article is to explain the new CIArb guidelines in simple terms, highlight the opportunities and risks that AI introduces, and provide practical guidance for lawyers, businesses, and arbitrators on how to use AI tools in arbitration while safeguarding fairness and credibility.

The CIArb Guideline- Structure, Status and Purpose

The CIArb instrument is expressly non-binding soft law: a practical guide rather than a prescriptive rulebook. Structurally, it is organized in four Parts:

i. benefits and risks;
ii. recommendations for parties and counsel;
iii. tribunal powers to regulate AI use by parties; and
iv. the use of AI by arbitrators themselves followed by template documents (a model Agreement on the Use of AI and model Procedural Orders).

Its object is narrow and pragmatic: to enable stakeholders to exploit AI's advantages while minimizing risks to fairness and enforceability.

Why The Guideline Matters-The Normative Backdrop

Two facts make these guidelines immediately useful:

1. Arbitration does not exist in a vacuum. Party choices are checked by institutional rules, national arbitration laws (many based on the UNCITRAL Model Law), and treaty rules like the 1958 New York Convention. If an award looks unfair or tainted by secret AI use, courts might refuse to enforce it or set it aside.
2. AI brings particular risks opaque "black-box" decisioning, bias from the data AI was trained on, accidental disclosure of privileged documents to third-party AI platforms, and cross-border data transfers. The guidelines help everyone know what to disclose, test and record so awards stay defensible.

Definitions and Taxonomy-Why Labels Carry Legal Consequences

Clarity of language is foundational. The CIArb guidance draws simple lines between a few things so everyone knows what rules apply:

i. **AI tool** — any computer system that turns inputs into outputs (for example, a program that searches and sorts documents).
ii. **Generative AI (Gen AI) tool** — systems that create new content, like drafting text or generating summaries.
iii. **Private use** — when a party or their lawyer uses AI only for internal work (e.g., reviewing files).
iv. **Tribunal-facing use** — when AI-produced material is shown to the tribunal as evidence or part of submissions.

Those distinctions aren't just academic. Whether a tool was used behind the scenes or whether it changed what gets put before the tribunal affects several practical things: whether you must tell the other side about it, whether confidentiality or privilege is at risk, and whether the tribunal can demand testing or audits of the AI output. In short calling a tool by the right name helps everyone understand what must be disclosed, preserved, or examined.

Benefits and Attendant Risks- The Guideline's Risk-Benefit Ledger

1. Efficiency Gains- AI's practical utility in arbitration is plain: accelerated document review (predictive coding), automated issue-spotting, assisted legal research and forecasting, scheduling and case-management automation. These tools can materially reduce time and cost and allow human decision-makers to focus on high-value adjudicative work.
2. Risks that threaten Fairness and Enforceability- AI brings real benefits, but it also creates risks that can make an arbitration unfair or vulnerable to challenge in court. For example, AI can be a "black box" whose reasoning can't be explained, it can produce biased results because of the data it was trained on, and parties may accidentally upload privileged documents to third-party AI services. There is also a worry that an award could look like it was generated by a machine rather than the tribunal's own reasoning. Any of these problems can give a court a reason to review an award or even set it aside. That is why the CIArb guidance stresses openness about AI use, independent testing of AI outputs when needed, and clear contracts that spell out who is responsible for what.

A Short explainer of each risk in plain terms:

i. **Black-box opacity:** If you can't explain how the AI reached a result, it's hard for the other side to challenge it in cross-examination.
ii. **Training-data bias:** If the AI was trained on skewed data, its outputs may unfairly favour one side.
iii. **Accidental privilege waiver:** Uploading confidential or privileged material to a third-party AI tool can destroy legal protections.
iv. **"Algorithmic" award appearance**: If an award seems machine-produced rather than the product of human reasoning, courts may doubt its legitimacy.

Because these risks can threaten the enforceability of an award, the Guideline recommends transparency, testing (or expert review) where AI materially affects evidence, and clear contractual rules allocating responsibility and costs for any AI-related checks.

Party Autonomy, Contractual Calibration and Model Clauses

Party autonomy remains the engine of arbitration. The Guideline recommends parties expressly address AI in their arbitration agreements or procedural orders: define permissible AI uses, require vendor due diligence, mandate disclosure of AI-assisted outputs, protect privileged material and establish audit and reproducibility rights. The included model Agreement and Procedural Orders are designed as starting points for bespoke drafting calibrated to sectoral and jurisdictional

risks. Where parties choose silence, tribunals retain power to regulate AI use on fairness grounds but contractual clarity reduces later disputes.

Tribunal Powers: Discretion, Inspection and Proportional Remedies

A central practical point, tribunals possess managerial powers to direct disclosure about AI use, order testing of AI outputs, grant inspection or appoint neutral technical experts. Remedies for non-compliance include adverse evidential inferences, exclusion of tainted material, cost sanctions and, in extreme cases of concealment, adverse findings bearing on the award. The Guideline frames these powers as necessary prophylaxis to preserve the integrity of proceedings and the enforceability of any award.

Arbitrators' use of AI- Assistance Permitted and Delegation Prohibited

The Guideline draws a doctrinally important bright line where arbitrators may employ AI as an instrument to organize documents, draft scheduling orders, summarize volumes or assist with non-decisional administrative tasks but they must not delegate the adjudicative act of reasoning to a machine. Awards must remain the product of human adjudicative judgment; where AI materially informs reasoning, transparency is required so that parties and reviewing courts can understand how conclusions were reached. This command preserves the "intuitu personae" and legitimacy that human arbitrators bring to the process.

Machine Arbitrators- Doctrinal Limits and Jurisdictional Variance.

The notion of appointing a machine as an arbitrator "machine arbitration" provokes both doctrinal and policy questions. Legally, many arbitration statutes are silent on whether arbitrators must be natural persons; UNCITRAL's Model Law defines an "arbitral tribunal" as a sole arbitrator or panel, without expressly requiring human status. Yet some national laws expressly mandate a natural person such as France's Decree No. 2011-48 provides that only a natural person with full capacity may act as an arbitrator. Other jurisdictions (and certain institutional rules) implicitly or explicitly reserve core decision-making to humans. Practically, even where the law permits machine appointment by lacuna, parties must contend with enforceability, public-policy challenges and the reputational legitimacy that human decision-makers confer on awards.

Evidence, Admissibility and Technical Experts

AI-derived outputs should be treated as any other piece of evidence whereby admissibility rests on foundation and relevance. To defend or challenge AI outputs, parties will often need technical expert evidence addressing training data, model architecture, reproducibility and bias-mitigation. The Guideline endorses neutral or jointly appointed technical experts where feasible to minimize partisan duelling and to furnish tribunals with a sound basis for assessing algorithmic reliability. Such processes help ensure evidentiary transparency without needlessly inhibiting efficient AI use.

Confidentiality, Privilege and Data Protection- Practical Precautions

AI systems often require ingestion of data; that raises immediate confidentiality and privilege traps. Uploading privileged communications to third-party generation AI platforms may extinguish privilege; cross-border data transfers may implicate applicable data-protection laws and transfer regimes. The Guideline therefore recommends contractual safeguards with vendors (data-processing agreements), consideration of on-premises or closed-system solutions, minimisation of data shared with external providers and careful redaction processes. These steps reduce the risk that an otherwise enforceable award becomes vulnerable on public-policy or privacy grounds.

Conclusion- A Calibrated Embrace of AI

The CIArb Guideline marks a pragmatic pivot in arbitral practice: it neither fetters innovation nor abdicates the tribunal's custodial responsibility to protect procedural fairness and enforceability. For practitioners, the lesson is twofold. First, adopt AI where it adds demonstrable value in document review, case management and legal research. Second, do so transparently and contractually: document vendor due diligence, protect privilege and data, and ensure tribunals retain effective oversight. In short, AI should be harnessed as an instrument of greater access, efficiency and reasoned decision-making not as a substitute for human adjudicative judgment.

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