CURRENT TRENDS IN EMPLOYMENT DISPUTES IN KENYA –
A DISTURBING TRAJECTORY
Presented by:
WILLIAM MAEMA, Advocate
Senior Partner – Iseme, Kamau & Maema Advocates
to
Strathmore Law School
on
14th September, 2016
CONTENTS

1. INTRODUCTION ................................................................................................................................. 4

2. LEGAL FOUNDATIONS ......................................................................................................................... 5
   ii) Employment Act, 2007 (No. 11 of 2007) .......................................................................................... 5
   iii) Employment and Labour Relations Court Act, 2011 (No. 20 of 2011) ...................................... 5
   iv) Labour Relations Act (No. 14 of 2007) ............................................................................................ 5
   v) Labour Institutions Act (No. 12 of 2007) ......................................................................................... 5
   vi) Occupational Safety and Health Act, (No.15 of 2007) ................................................................. 5

3. TOP TEN TRIGGERS OF EMPLOYMENT DISPUTES ......................................................................... 6
   i) Termination/Summary Dismissal ........................................................................................................ 6
   ii) Breach of Employment Contract Terms .......................................................................................... 6
   iii) Conflicts with Trade Unions ............................................................................................................ 6
   iv) Work Injury ....................................................................................................................................... 6
   v) Discrimination ................................................................................................................................... 7
   vi) Sexual Harassment ............................................................................................................................ 7
   vii) Service Pay ...................................................................................................................................... 7
   viii) Termination for Cause: Reasons or No Reasons? ....................................................................... 9
   ix) Suspension ...................................................................................................................................... 10
   x) Waiver of Claims ............................................................................................................................. 11

4. TERMINATION OPTIONS ...................................................................................................................... 12
   a) Resignation .................................................................................................................................. 12
   b) Termination by Employer ................................................................................................................. 13
   c) Summary Dismissal ......................................................................................................................... 13
   d) Redundancy ................................................................................................................................... 14
   e) End of Probation/Confirmation of Employment ............................................................................ 15
   f) Mutual Separation ............................................................................................................................ 16
   g) Expiry of Fixed Term Contracts ..................................................................................................... 16
   h) Retirement ...................................................................................................................................... 17

5. REMEDIES ............................................................................................................................................... 18

6. CONCLUSIONS & RECOMMENDATIONS ......................................................................................... 19
Kenya has had “new labour laws since 2007. As we approach the end of a decade since the enactment of the legislation, it is perhaps an opportune moment to look at how these laws have been interpreted by the courts and to what extent they have served the country.

To be precise, the current labour laws were enacted in December 2007, a most significant period in the history of Kenya. Therefore, an appreciation of the historical and political context in which the laws were passed provides an essential key to a contextualized understanding of the laws under discussion.

The laws were enacted a few days to the general election and were among the last batch of laws to be signed by President Kibaki at the end of his first term in office. The ruling PNU party was keen to win the election and secure a second term in office despite very stiff competition from the opposition which, going by all the opinion polls at the time, were poised to win the election. Indeed, the contest was so hot that following the declaration of the results, the country entered into one of its darkest chapters in history – the 2007/2008 post election violence which almost degenerated into a civil war. It is therefore fair to say that every vote counted in this election.

The Central Organisation of Trade Unions (COTU) had for many years been pushing for the passage of more “employee-friendly” labour laws without much success due to sustained opposition from the Federation of Kenyan Employers (FKE). The high stakes posed by the general election provided COTU with a perfect opportunity to arm-twist both the legislature and the executive to pass the controversial laws. Indeed, COTU had issued an ultimatum to the Government that it would mobilize its membership (read all Kenyan workers) to vote against the ruling party unless the laws were passed before the election date. It did not help that during this time, most Members of Parliament were busy campaigning out in the countryside when the Bills were tabled for debate in Parliament. As expected, the laws were passed almost in the same form in which they had been proposed by COTU without much debate or scrutiny and swiftly signed into law by a president who was desperately seeking a second and last term in office.

The other historical fact to bear in mind is that the Industrial Court which was later renamed the Employment and Labour Relations Court (“ELRC”) has, since its inception, regarded itself as the custodian and watchdog of employee rights, much like COTU. Going by the majority of the judgments issued by the court, one would be forgiven for concluding that the court’s unwritten ideology is: “the employee is always right unless the employer proves otherwise beyond reasonable doubt”.

Finally, following the adoption of the 2010 constitution, Kenyans have become more enlightened on their legal rights and, not unexpectedly, more litigious than they have ever been since independence.

The upshot of the above context is that:

a) we have laws that were largely drafted by employees (COTU) and vehemently opposed by employers (FKE);

b) the laws were passed at a most inappropriate time in the history of the country, shrouded in political blackmail and without much scrutiny; and

c) the laws provide the ELRC with its most potent weapon yet for furtherance of its ‘pro-employee’ ideology.
2. LEGAL FOUNDATIONS

Kenyan labour laws are founded on 3 sources, namely, the Constitution; statute and contract.

i) THE CONSTITUTION OF KENYA, 2010

The Bill of Rights includes “Labour Relations” under Article 41 of the Constitution. It provides that every person has “the right to fair labour practices” as well as the right to:

a) fair remuneration
b) reasonable working conditions
c) joining and participating in trade unions;
d) to go on strike.

Further, Article 162 (2)(a) provides for the establishment of the ELRC with exclusive jurisdiction to determine and settle all labour disputes in Kenya.

ii) EMPLOYMENT ACT, 2007 (NO. 11 OF 2007)

This Act is the primary law on employment in Kenya. It replaced the previous Employment Act (Cap. 226).

iii) EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011 (NO. 20 OF 2011)

This Act establishes the ELRC and sets out its objectives, composition, jurisdiction and procedure. It was previously referred to as the Industrial Court Act but was later renamed the ELRC pursuant to the Statute Law (Miscellaneous Amendments Act, 2014 published in the Special Gazette Supplement No. 160 (Acts No. 18 of 2014).

iv) LABOUR RELATIONS ACT (NO. 14 OF 2007)

This Act provides for the registration, regulation, management of trade unions, employers and organizations or federations. It replaced the Trade Unions Act, (Cap.233) and the Trade Disputes Act, (Cap. 234).

v) LABOUR INSTITUTIONS ACT (NO. 12 OF 2007)

This Act establishes the various labour institutions — The National Labour Board, Committee of Inquiry, Wages Council, and Employment Agencies etc. It replaced the Regulation of Wages and Conditions of Employment Act, (Cap. 229).

vi) OCCUPATIONAL SAFETY AND HEALTH ACT, (NO.15 OF 2007)

This Act provides for the safety and welfare of employees and all persons lawfully present at workplaces. It also establishes the National Council for Occupational Safety and Health. It replaced the Factories and Other Places of Work Act, (Cap. 514).
3. TOP TEN TRIGGERS OF EMPLOYMENT DISPUTES

Employment disputes are normally triggered by one or more of the following events:

i) TERMINATION/SUMMARY DISMISSAL

This is by far the most common cause of employment disputes in Kenya. Disputes in this area arise from 2 fundamental aspects, namely, i) validity of the underlying circumstances and b) procedural irregularity/unfairness.

There is a substantial difference between termination of employment and summary dismissal. Termination can be effected by either party giving to the other the required notice or paying in lieu thereof. The employee is paid all his benefits. On the other hand, summary dismissal arises where the employee has committed an act of gross misconduct and is literally fired without notice but subject of course to a disciplinary hearing. In that case his only entitlement is salary up to the date of dismissal and pay for any accrued leave. Generally, no other benefits are payable.

ii) BREACH OF EMPLOYMENT CONTRACT TERMS

Even where termination has been properly done or the contract is still in force, a party can still maintain a claim based on the breach of a material term of the contract by the other party e.g. failure to pay/increase salary or bonuses as required under the contract.

In SBI International Holdings Ag (Kenya) v Amos Hadar [2015] eKLR a clause in the employment contract prohibited the respondent from engaging in any other work or business during his employment with the claimant. The court held that the respondent had knowingly breached an express term of his employment contract and reliefs sought by the employer were granted.

iii) CONFLICTS WITH TRADE UNIONS

Generally, unionized employees are represented by their unions in labour disputes. These disputes normally continue in court concurrently with the employment relationship e.g. teachers, doctors, etc.

The disputes usually relate to the refusal by the employer to negotiate/renew Collective Bargaining Agreements (CBAs) or to implement some of its terms e.g. increase of salary.

In Kenya Hotels & Allied Workers Union v New Victoria Hotel [2013] eKLR, the respondents’ management had refused to sign a recognition agreement with the claimants, to deduct and remit union dues and had victimized the claimants’ members for engaging in trade union activities. The court ordered the respondents to recognize the union and start negotiations leading to the signing of a Collective Bargaining Agreement within 90 days and immediately start paying the union dues to the claimants in respect of employees who had given their indication to join the union.

In Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers [Kudheicha] v North Coast Beach Hotel [2015] eKLR, the court held that the respondent had acted in breach of the CBA by dismissing employees after issuing them with fixed term contracts to avoid the provisions of the CBA which required that all employees who had worked for an aggregate period exceeding one year were deemed to be employed on permanent basis.

iv) WORK INJURY

The Occupational Safety and Health Act, 2007 (the “OSHA”), imposes a duty on the employer to protect the health, safety and welfare of his employees and other people who might be affected by their business. Breach of this statutory duty may lead to labour disputes.

In European Committee for Agriculture Training Rural Development (C.E.F.A) Kenya v Moses Muriuki Matri [2015] eKLR, the appellate court held that the legislation confers upon employees the right to proper protection in terms of health and safety at work and also imposes a corresponding duty on the employer to protect employees from risks and injury.
Disputes of this nature are usually filed as the employment relationship subsists. An employer who terminates the services of an employee on account of such employee having filed a claim against the employer would be held liable for unfair termination.

In Justus Katana Charo v Ready Consultancy Company Limited [2015] eKLR, the claimant alleged that his employment was terminated on account of filing a suit against the employer for compensation for injuries suffered while in employment. The court held that had the facts alleged by the claimant been supported by evidence, his termination would have been declared unfair.

v) DISCRIMINATION

Both Article 27 of the Constitution and Section 5 of the Act prohibit discrimination on the basis of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.

Section 5(7) of the Act provides that when discrimination has been alleged by an employee, the burden of proof shifts to the employer who must show that it did not take place. This is a queer provision because it runs counter to the well known principle in the law of evidence that ‘he who asserts proves’. Where the law is tilted in favour of the employee in this manner what chance does the employer have to convince the court that in fact the alleged discrimination did not take place?

In Koki Muia v Samsung Electronics East Africa Limited [2015] eKLR, evidence adduced in court showed that the respondent did not permit the ascension of Kenyans to high offices but “instead hired incompetent Korean nationals to supervise and oversee more qualified Kenyans”. The court found the dismissal of the claimant to be unfair and unlawful in the circumstances and further that she was subjected to racial and sexual discrimination. The court awarded the claimant, among others, 12 months’ salary compensation on account of sexual and racial discrimination as well as the sum of Ksh. 7,152,000/- on account of unlawful termination.

In VMK v Catholic University of Eastern Africa [2013] eKLR, the claimant was awarded damages of Ksh. 5 Million on account of discrimination based on her HIV positive status. It was alleged that the University had a policy that people who were HIV positive could not be employed on permanent basis. The court said: “The testing of HIV status without her consent and the disclosure of her status to 3rd persons without her authority demonstrates the seriousness of the violations and the need to compensate the claimant for the hurt feelings and eventual loss of employment due to HIV status.”

vi) SEXUAL HARASSMENT

An employee (of either gender) who has been subjected to sexual harassment may maintain a claim against the employer.

Under Section 6 (2) of the Employment Act, every employer is required to have sexual harassment policy setting out the procedure that an employee who has been subjected to sexual should follow in filing the complaint and pursuing a remedy.

Most employers are found liable not because the act of sexual harassment occurred but because they did not have such a policy. In CAS v C S Limited [2016] eKLR – the employer was found to be in breach of the Employment Act for failure to have a sexual harassment policy.

Sexual harassment claims are usually raised within a claim for unfair termination. Rarely do employees make such claims while still in employment.

vii) SERVICE PAY

This term ‘service’ pay is not to be confused with ‘severance’ pay which is payable on account of a redundancy.

Section 35 (5) of the Act provides that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked “at such rate as shall be fixed”. This inelegant language has resulted in a great deal of confusion in the interpretation of the provisions relating to service pay.

Prior to 2007, the concept of ‘service pay’ was only found in collective bargaining agreements and applied only to unionised staff. The idea was to provide employees who had served for a substantial
period of time with some lump-sum payment upon
the termination of their contracts by the employer,
something akin to a gratuity or pension.

The provision, presumably drafted by COTU, did not
fix the rate or provide a formula of how it is to be
fixed.

Interestingly, instead of facing up to this lacuna and
calling for legislative reform to clarify the provision
or simply declaring it impracticable to implement,
the court has, without any basis whatsoever,
proceeded to presume that the rate is to be fixed
by the employer. This does not make much sense
because a) the law does not say so and b) one party
to a contract cannot unilaterally dictate the terms.
What, for instance, would happen if the employer
fixed a rate that was unacceptable to the employee?

Further, the ELRC has, again without any reasonable
basis and quite erroneously in my view, taken the
view that in the absence of a defined rate in the
contract of employment, the rate applicable to
severance pay on account of redundancy also applies
to service pay! What surely is the basis for drawing
the analogy between service pay and severance pay?

In Daniel Olouch Oguta v the Hon. Attorney
General & another, Industrial Cause No. 1223
of 2012, the court held that “the claimant was
entitled to service pay for every year worked, the terms
of which shall be fixed...no evidence has been placed
before the court on the rate of calculating severance
pay... the court will however be guided by the provisions
of the Employment Act with regard to redundancy and
in particular Section 40 (a) and apply a similar rate to
that applicable to employees terminated on account of
redundancy at the rate “not less than fifteen days’ pay
for each completed year of service”.

This case demonstrates the extent to which the labour
court is prepared to bend backwards to
reach a finding that is favourable to the employee.
The logical implication of the court’s reasoning is
to equate ordinary termination of employment to
a redundancy which is completely incorrect and
has huge financial implications on the employer.
It makes the termination of employment a very
costly affair and lends credence to FKE’s often-
repeated argument that the 2007 labour laws are
very expensive to implement.

Fortunately, Section 35 (6) of the Employment Act
attempts to water down the adverse implications
of the requirement for service pay by listing down
some exceptions to the rule, namely, that service
pay would not be applicable where the employee is
a member of a:

a) registered pension scheme or provident fund;
b) gratuity or service pay scheme;
c) any other scheme established by the employer
whose terms are more favourable than the
scheme established under the Employment Act
(none is established!); or
d) national social security fund.

The above exceptions, taken together, render the
requirement for service pay almost meaningless.
For instance, since NSSF is a mandatory registration
which applies to all employees, it follows that no
employee would qualify for service pay so long as
the NSSF membership subsists. However, despite
this very clear provision, the ELRC has again in my
view misinterpreted the law and held that for this
exception to apply, the employer must demonstrate
that he has been making regular contributions to
NSSF on behalf of the employee.

In Elijah Kipkoros Tonui v Ngara Opticians
T/A Bright Eyes Limited [2014] eKLR, the
respondent failed to pay the claimant part of his
terminal dues after working for 25 years and
further failed to remit the National Social Security
Fund contributions consistently. Evidence adduced
in court revealed that the Respondent had not
remitted NSSF payments for a consecutive period of
5 years. The court held “this law is intended to ensure
employees do not enter into retirement without social
security. At the same time, the interest of employers
is safeguarded, through the restriction on employees
being paid double social security benefits. Service
pay is therefore payable under Section 35 [5] only to
employees who are not covered under the different social
security mechanisms elaborated under Section 35 [6]...The Claimant shall therefore be paid service pay, less any
benefits made on the Claimant from the National Social
Security Fund”. 

08 | Current Trends in Employment Disputes in Kenya
On the mode of computation of service pay, the court applied the rate for severance pay, noting:

“Decisions of the Honourable Judges of the Industrial Court have in the recent past viewed the payment of service pay as a bare statutory minimum, and enforced the provision even in the absence of express fixed terms of service pay, based on the minimum 15 days’ salary for every completed year of service given under the redundancy law, and which is also the floor in most industrial wage orders on severance, gratuity or service pay. Employees who hold terms and conditions of employment without fixed terms on the service pay should not be discriminated, and the Court fully embraces recent decisions which have adopted the 15 days’ salary for each completed year of service, whenever such default is present.”

For the record, Section 35(6) does not mention anything about contributions to NSSF or the regularity of such contributions. It only refers to membership. Would it, perhaps, not have been more logical for the court in the above case to hold the employer liable for all unpaid NSSF dues, interest and penalties instead of imposing a more generous but unjustified formula for the computation of service pay?

viii) TERMINATION FOR CAUSE: REASONS OR NO REASONS?

Is the employer required to give reasons for any kind of termination?

The doctrine of freedom of contract dictates that one may freely enter and exit a contract at will, subject only to giving the proper contractual notice. This notwithstanding, the ELRC apparently thinks otherwise and has categorically stated that Kenyan law no longer recognizes the concept of “employment at will”.

The law does not specifically require the employer to give reasons for termination in every case. The relevant provision is Section 43(1) of the Employment Act which provides as follows:

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

Firstly, the above provision illustrates the obvious influence of COTU in the formulation of the 2007 labour laws. Prior to 2007, no such provision existed in the laws and both the employer and employee clearly understood that either of them could opt out of the contract at any point by either giving notice or paying in lieu thereof. This was indeed never a disputed issue. It is therefore not clear why it was inserted in the law.

Secondly, the labour court has latched onto the above provision to declare that while the employee is free to end the contract of employment at any time by simply tendering his resignation, the employer does not enjoy such a right. According to the court, unlike the employee, the employer has no right to terminate a contract of employment unless he has a valid reason for doing so. Is this really the correct interpretation of the law?

The objective interpretation of the above provision is that reasons for termination are only required when a claim for unfair termination has been lodged by an employee who presumably argues that there existed some underlying reasons for the termination which, had they been disclosed to him, he would have explained and probably saved his job. To the extent that the employer acted on such undisclosed reasons without giving the employee an opportunity to respond to them, the termination is unfair.

I take the view that there are many situations when an employer might want to get rid of an employee without necessarily having any reasons worth disclosing to the employee. For example the employee might be an average performer, a mildly bad influence, pathological gossiper, person of loose morals, incorrigible bad human habits, non conducive family situation or the employer might simply have identified a better replacement. In such circumstances, to confront the employee with
'reasons' of this kind would not be useful since he will most likely become defensive and dispute the validity of the reasons.

The ELRC has, however, taken the view that not only must the employer give reasons in every case before terminating an employment contract, he must also accord the employee an opportunity to be heard in the manner contemplated under Section 41(1). It is worth noting that this section requires a disciplinary hearing only in the cases of summary dismissal and termination based on misconduct, poor performance or physical incapacity. However, as the cases below demonstrate, the ELRC has expanded the scope of this Section to include all cases of termination.

In Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR, the court held that the reasons for termination must be given prior to and not after termination. The judge said: “Under subsection 43 (2) …However this reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.”

Where does the court infer the requirement of giving reasons and holding a hearing in every termination case from and why does it apply to the employee only?

Further, in James Kabengi Mugo v Syngenta East Africa Limited [2013] eKLR, the court stated:

“The Kenyan Employment Law no longer accepts that employers can fire employees at will, for any reason or no reason. …This at will doctrine was the dominant termination law in Kenya prior to the advent of the Employment Act 2007… The Law has now been made unambiguous, with the employment protections that came with the enactment of the Employment Act in 2007.”

Is the law really “unambiguous” on this issue as the court claims? Since the scope of Section 41(1) is limited to summary dismissal and termination based on poor performance or physical incapacity, where does the ELRC infer the basis to extend the scope of this provision to all kinds of termination?

According to the court, the only exception where reasons and a hearing are not required is the termination of probationary contracts as provided under Section 42(1). However, the court overlooked the fact that Section 42(1) does not apply generally but is limited to the subject of Section 41(1) i.e. summary dismissal and termination on account of poor performance or physical incapacity. The writer’s interpretation of Section 42(1) is that when summarily dismissing and employee or terminating his employment during the probation period, it is not necessary to hold the disciplinary hearing required under Section 41(1).

In Danish Jalang’o & another v Amicabre Travel Services Limited [2014] eKLR, the court stated: “There is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days’ wages before termination, there can be no further demands made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts.”

ix) SUSPENSION

This is a much misunderstood concept in Kenya. The law does not provide for suspension of employees. It can, however, be sanctioned by either the employment contract or HR Manual (provided the terms of the HR Manual are incorporated by reference into the employment contract).
Suspension is only lawful if:

- it is allowed under the contract or HR policies of the employer;
- it is for a relatively short period sufficient for completion of investigations;
- employee is paid his full pay for the duration of the suspension irrespective of the outcome of the investigation; and
- suspension is not an end in itself and should not be used as punishment.

In *Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR* the court stated:

“Section 19 of the Employment Act outlines nine occasions when the Employer may deduct from the wages of an Employee. No provision under this law allows the employer to deny a suspended employee his monthly salary as ‘a warning of the effect of losing his job and as a reminder to the Employee that he would lose his job if he continued being indisciplined.’ Withholding of an Employee’s salary cannot be a disciplinary sanction. The salary remains protected under Part IV of the Employment Act, even during suspension. The contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages.”

In *Peterson Ndung’u & 5 Others v. KP&L Company Limited [2014],* the court held:

“The salary remains protected under Part IV of the Employment Act, even during suspension. The contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages. The Claimant is entitled to the salary and allowances for the duration he was under suspension. To uphold the Respondent’s decision in withholding these would mean that the Claimant is punished twice, over the same employment wrong.”

In *Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & Another [2012] eKLR* the court held: “An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension. To keep an employee on suspension, without pay for over 7 months, waiting for them to blink first is not only unlawful but also inhumane.”

### x) WAIVER OF CLAIMS

In the context of a mutual separation it is not uncommon for employers to require the employees to sign a waiver or discharge confirming that subject only to the payment of the agreed terminal dues, they have no other or further claims against the employer.

This waiver/discharge is normally the consideration on the part of the employee for a more generous separation package than the statutory and contractual entitlement.

While a waiver/discharge is legally enforceable provided it is not achieved through intimidation, coercion, inducement or other factor that would vitiate an ordinary contract, it is important to note that it cannot be used by an employer to avoid the liability of paying the employee’s statutory and contractual dues. The court would not hesitate to trash such waiver/discharge upon evidence that it was intended to deprive the employee of his lawful dues.

In *Simon Muguku Gichigi Vs Taifa Sacco Society Ltd (Industrial Court Cause No 681 of 2012),* the court held “An employer cannot therefore circumvent their obligation to an employee by producing a form of discharge executed by the employee. If the law is not followed, no form of discharge can cure the irregularity.”
The employment relationship may be brought to an end through any of the following methods:

a) resignation;
b) termination by the employer;
c) summary dismissal;
d) redundancy;
e) end of probation;
f) mutual agreement of the parties;
g) expiry of fixed time; or
h) retirement.

a) RESIGNATION

i) WITHOUT NOTICE

Where the employee resigns without giving the contractual notice or paying in lieu, the employer can seek damages which are normally assessed as the equivalent of the salary payable during the contractual notice period.

In certain business sectors especially where there is sensitive information concerning customers, trade secrets, intellectual property rights, etc. an employer may be able to obtain an injunction to prevent the employee from taking up employment with a competitor during the notice period.

In SBI International Holdings Ag (Kenya) v Amos Hadar [2015] eKLR, the claimant, among other prayers, sought a permanent injunction restraining the respondent from disclosing what it referred to as trade secrets, confidential and disparaging information. The court stated: “in the normal course of employment, the employee will get to learn their employer’s confidential information and as long as the information is proprietary in nature and is revealed in confidence, then the employee has a common law duty not to reveal the information. This duty applies irrespective of whether there exists a confidentiality agreement or clause in the employee’s employment contract and generally extends beyond the life of the employment relationship”. In this case however, no particular trade secret or confidential information was placed before the court. The plea for a permanent injunction was therefore declined.

In this case however, no particular trade secret or confidential information was placed before the court. The plea for a permanent injunction was therefore declined.

ii) BY NOTICE

Either party is required to give the requisite contractual notice or pay in lieu (PILON). In some cases, the employer may decide to allow the employee to proceed on garden leave instead of working during the notice period on such terms as may be mutually agreed.

iii) CONSTRUCTIVE DISMISSAL

This arises where an employee resigns in response to a fundamental breach of the contract by the employer.

The concept is not expressly provided for in the law, but the ELRC has recognized and applied it as one of the grounds for wrongful and unfair termination.

An employee is said to have been constructively dismissed where:

a) the employer is in breach of a fundamental term of the contract of employment to the extent that the continuation of the employment relationship is untenable; and
b) the employee resigns in response to that breach.

Examples of breach of contract by the employer include:

i) unilateral variation of the terms of the contract without consent or reasonable negotiation;
ii) an unlawful deduction of wages or failure to pay;
iii) demotion or major change to the employee’s duties or status; or
iv) sexual harassment.
In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the court stated “…in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue”.

In constructive dismissal, it is not necessary that the employee must leave immediately without giving notice although this is common. Even if he has tendered a valid resignation notice his claim for constructive dismissal remains valid. However, the employer’s conduct must be the effective proximate cause of leaving.

Acquiescence can vitiate this claim e.g., where the employee continues working long after the breach occurred.

**b) TERMINATION BY EMPLOYER**

i) **TERMINATION BY NOTICE**

In terminating a contract, the employer must give proper contractual notice or at least one (1) month if none is provided for.

ii) **BY PAYMENT IN LIEU OF NOTICE (PILO)**

The key point to note here is that what terminates the contract is the payment and not promise to pay. The employer must therefore pay in cash or cleared funds to ensure that the contract is effectively terminated. Paying by instalments constitutes a defective termination. The employee is deemed to be in full employment until the last penny is paid.

In *Juliet Oyando v Hipora Business Solutions (EA) Limited* [2016] eKLR, the claimant had nine (9) months left to serve her contract, but it was terminated by the employer purportedly by PILON. However, the employer did not make the payment upon termination in spite of the promise to do so in the letter of termination. The court found the termination by the respondent unlawful and unfair and proceeded to award the claimant 9 months’ salary being compensation.

c) **SUMMARY DISMISSAL**

Section 44 of the Act allows an employer to terminate the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Specifically, Section 44 (3) provides: “Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

The grounds upon which an employee can be summarily dismissed are set out in the Act but the list is not exhaustive. Additional grounds may be set out in the contract or HR Manual.

Both the Act and local jurisprudence require that before summarily dismissing an employee, such employee must be given an opportunity to be heard and defend himself before a disciplinary panel.

Section 41 of the Act provides that “an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

The ELRC appears to have correctly applied the legal provisions concerning summary dismissal. In *Fred Ondari Makori -vs- The Management Committee of Ministry of Works Sports Club ICCC 1079 of 2010*, where, despite the existence of valid reasons for dismissing the employee summarily, the summary dismissal was successfully challenged for failure to abide by the laid down procedures as to a fair hearing. The court observed: “the Respondent had valid reason under Section 44[4] [a] of the Employment Act 2007, to summarily dismiss the Claimant. The Respondent did not however, go about doing so, following the minimum statutory procedure... There was no hearing in the manner contemplated under Section 41 of the Employment Act 2007... The letter of summary dismissal is more like the formal charge that
should have been read to the Claimant at the disciplinary hearing. Fair procedure was absent from the process. To this extent, termination was unfair...."

Procedure

a) investigations into the conduct must be conducted and concluded;

b) a notice to show cause is issued to the employee inviting him to a disciplinary hearing to show cause why he should not be summarily dismissed on account of the charges levelled against him. The notice should specify the charges clearly as well as the date, time and venue for the hearing. The employee should also be informed, via this notice, that he is entitled to have another employee of his choice to accompany him to the hearing.

c) at the actual disciplinary hearing, the disciplinary panel should explain to the employee, in a language he understands, the reasons for considering the proposed termination/summary dismissal; and present to the employee all the evidence it has against him in support of the allegations.

d) upon the conclusion of the hearing, the disciplinary panel should release the employee and recess to consider the representations made by the employee before making a ruling. It is important to take a reasonable time before delivering the verdict and we recommend 24 – 48 hours after the close of the hearing. This helps to avoid the impression that the panel conducted the proceedings with a foregone conclusion.

e) the ruling can be delivered in writing by the chair of the disciplinary panel or any member of it. There is no need to call the employee in for another appearance before the panel for delivery of the ruling but it should be communicated to him within a reasonable time.

Note – the Act contemplates an oral hearing. Written communications/submissions without oral hearing is a ground for unfair procedure as was held in Kiliopa Omukuba Okutoyi V Telkom Kenya [2012]eKLR: "..., the hearing by written submissions by the claimant to the respondent does not meet the threshold envisaged by the Employment Act ... Under the Act, what is stipulated is a hearing and a consideration of any representation, which can be interpreted to mean by a person close to the claimant, a union representative or any other member of staff that would be a witness or appear in representative capacity at any hearing.”

f) the employer is required to maintain records of minutes of the disciplinary hearing.

g) the employee has the right to appeal against the ruling through the internal processes specified in the employer’s policies (if any) or ultimately to the ELRC.

d) REDUNDANCY

As defined under Section 2 of the Employment Act., a redundancy means: “The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.

Test of Redundancy: whether the employee will be replaced.

Process

The requirements and procedure of effecting a lawful redundancy as set out under Section 40 of the Act, and as interpreted by the ELRC is as follows:

a) Prior consultation with the affected employees at least one (1) month before the date of the intended redundancy;

b) Issuance of the notice of intended termination due to redundancy to the affected employees at least one (1) month prior to the date of intended redundancy (the “First Notice”). This notice is usually issued immediately after the conclusion of the consultations referred above;

c) Notice to the labour officer to be issued to the labour officer at least one (1) month prior to the date of intended redundancy simultaneously with the First Notice;
d) Notice/letter of actual redundancy to be issued one month after the First notice (the “Second Notice”). However, the employer may, instead of giving this notice, opt to pay salary in lieu of this notice;

e) Certificate of Service to be issued to the employee at the end of the redundancy process (Section 51).

Please note that Section 40(1) (b) does not prescribe the timeframe for the issuance of the First Notice. However, the ELRC has held that such notice should be issued not less than one month prior to the date of the intended redundancy.

Failure by an employer to follow the above procedure while effecting a redundancy renders the whole process voidable and the courts may rule that the redundancy never occurred and the employees should be treated as being still in employment for purposes of compensation.

Courts have firmly held that the procedure prescribed under Section 40 of the Employment Act is mandatory and must be followed otherwise the redundancy process would be deemed to be unfair.

In *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR* while finding that the contract was unfairly terminated, the court held that the Respondent had not demonstrated that there was redundancy despite relying on it as a ground for dismissal: “... these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the provisions of the law. This is not a one day process as it must be participatory, consultative and informative. The employer must undertake a process to rationalize the various positions in their productivity and business line, which exercise affect various positions as held by their employees. Thus the positions become redundant and not the employees who are employed with skills needed by the employer. The process of redundancy does not affect the performance, qualification or conduct of the employees.”

In *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* the Court stated: “on the question whether this was a case for reorganization or redundancy, this must be seen in the light of the remedy sought by the claimant seeking reinstatement. The respondent in defence stated that the position the claimant occupied at Pension has now been outsourced and is no longer available. This therefore pre-empts an order directing reinstatement. However, looking at the provisions of section 40 of the Employment Act, where an employer due to operational requirements is reorganizing their business and need to lay off staff, there are outlined procedures that must be adhered to. There was no evidence by the respondent indicating the process undertaken in arriving at the reorganization that rendered the position of the claimant redundant. The claimant was the legal officer of the respondent, moved through the ranks and without prompting and while on suspension was deployed to Pensions department. It was not stated how many other employees were affected or whether they were laid off. To therefore give such a defence is to ignore the procedure and the substantive issues involved in a reorganization process. The respondent cannot therefore be found to rely on such a ground.”

Although not expressly required under the statute, courts have held that consultations before and during the retrenchment exercise is a universally accepted principle and is mandatory.

In *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR* the court stated: “Consultation, before and during the retrenchment exercise, is mandatory. Employees are consulted individually and through their trade union. They must be given reasonable opportunity to consider the proposal from the employer. Employees must be given time to respond to the proposal and their response given proper consideration by the employer. It is not a decision that is initially communicated by the employer, but a proposal that ushers in constructive social dialogue.”

e) END OF PROBATION/CONFIRMATION OF EMPLOYMENT

Section 42 (2) of the Act provides that “A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”
This means that the probationary period cannot be extended without the employee’s consent. Of course if he does not consent the contract will expire for want of confirmation. Where for any reason the letter of confirmation is not issued at the end of the probation period and the employee continues in employment, he is deemed to have been employed on permanent basis.

Generally, during the probationary period the contract is terminable by a shorter notice than after confirmation, subject to a statutory minimum of seven days’ or seven days’ wages in lieu of notice.

A disciplinary process is NOT mandatory for the dismissal of an employee during the probationary period.

In Agnes Yahuma Digo vs PJ Petroleum Equipment Ltd [2013] eKLR the court held that “The Claimant’s probation period would have come to an end on 12th August 2011 and in the express terms of the letter of appointment, the Claimant had a legitimate expectation that the Company’s decision would be communicated to her at least seven days before 12th August 2011. This was not done and the Claimant continued working. Since the Respondent failed to adhere to the express terms of the letter of appointment issued by it to the Claimant the same Respondent cannot come to Court and say that in fact the Claimant was not confirmed.”

f) MUTUAL SEPARATION

“Employment is not a marriage. It can be dissolved by consent”

Parties to an employment contract can mutually agree to terminate the contract on the basis of mutual undertakings between them e.g. waiver of claims, confidentiality, future cooperation, etc.

This method is not provided for in the law but it is commonplace and the terms of the mutual separation are legally enforceable. In Max Masoud Roshankar & another v Sky Aero Limited [2015] eKLR, where the court stated: “termination and resignation are matters of law or can be agreed upon by mutual consent of the contracting parties. An employee is allowed to resign and or terminate the contract of service upon giving notice or making payment in lieu of the agreed notice period. Equally an employer can exercise similar right of terminating an employee with notice or make a payment in lieu of such notice.”

Note that in the above case, the right of each party to terminate the contract at will is affirmed, with no mention of giving reasons or holding a disciplinary hearing prior to such termination.

The terms of the separation are normally contained in a Mutual Separation Agreement.

g) EXPIRY OF FIXED TERM CONTRACTS

The Employment Act allows parties to enter into either fixed term or open-ended contracts. The latter have no fixed period and come to an end through termination, dismissal, redundancy or mutual separation. However, while a fixed term contract may also end in the same way, its unique feature is that it terminates automatically upon the expiry of the fixed term, unless renewed by the mutual agreement of the parties.

It is important to ensure that a fixed term contract is well drafted to avoid the possibility of automatic renewal, unless, of course, that is the intention of the parties.

Generally, no notice of termination is required to be given before the expiry of the fixed term. In Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR the court held: “fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the
The proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract”.

It should, however, be noted that where a fixed term contract has been regularly renewed for a number of years, unless notice is given that the contract will not be renewed, the employee can successfully argue that he had a legitimate expectation that the contract would be renewed. In such case failure by the employer to notify the employee within a reasonable time that the contact will not be renewed could be the basis of a valid claim. In Banking Insurance & Finance Union (Kenya) v Kipsigis Teachers Sacco Society Limited [2013] eKLR, the Court held that the Respondent, in failing to inform the Claimant that his contract was not being renewed created a new contract between the parties upon termination of the previous fixed term contract.

In Ruth Gathoni Ngotho- Kariuki v. the Presbytery Church of East Africa & Anor, [2012] eKLR: “The Claimant was entitled to be informed by the Respondents the refusal to renew within the contractual three months before the lapsing of the expiring contract. By that conduct of the Respondents, the contract thereby was constructively renewed. The timelines in the contract for conveying the decision of refusal to renew created express trust, confidence and expectation that the Respondents’ silence, despite the Claimant’s inquiry, that the contract had or would be renewed.”

h) RETIREMENT

There is no prescribed retirement age in the private sector. However, it is not uncommon for specific employers to provide for retirement age either in their employment contracts or HR policies.

Since the employment Act also applies to the Government, it is important to note that the retirement age in the public sector is 60 years.
Remedies for unfair termination are set out in Section 49(1) as follows:

a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal arising between the date of dismissal and the date of expiry of the period of notice;

c) wages up to a maximum of **twelve months** based on the gross monthly wage or salary of the employee at the time of dismissal;

d) reinstatement (to be sparingly applied), more common in the public service; or

e) re-engagement of the employee to perform comparable work to that which he was performing prior to his dismissal, or other reasonably suitable work, at the same wage.
a) It is, hopefully, evident from the above analysis that Kenyan employment law is still developing but largely in reverse. There are a myriad of areas in the law that require a fresh and bold re-casting to avoid obvious lacunae and ambiguity. For example, Section 45(3) was declared unconstitutional in Samuel G Momanyi v Attorney General & Another (2012) eKLR. It is not inconceivable that many other provisions, if challenged, would meet the same fate. There are many other provisions such as those regarding the payment of service pay under Section 35 of the Employment Act as read together with the exceptions set out in Section 35(6) which make for muddled reading and interpretation. These and other areas call for an objective, balanced and well bench-marked legislative reform. Given the historical context of the passage of these laws, it is only reasonable that they should be re-looked at afresh within a sober atmosphere to come up with a balanced legislation that support business and is aligned to the country’s economic objectives and realities.

b) The principal objective of any good law is to achieve equity and fairness. Yet this is the one element that is singularly lacking in our employment laws. The laws read like an employees’ charter with virtually no protection whatsoever for employers against rogue employees. The heavy hammer of the law should fall with equal force both on the oppressive employer and the extortionist employee.

c) Finally, having been elevated to the status of a High Court under 2010 Constitution, the ELRC should transform itself from a trade union tribunal into a court of justice where everyone feels equal before the law. Jurisprudentially, it is wrong for a court of law to be perceived as lacking impartiality and being openly biased towards one category of litigants. Many decisions issued by this court portray a court that is hell-bent to misinterpret the law if necessary or apply non-existent principles in order to arrive at a finding that is favourable to employee litigants. It is bad jurisprudence when the best advice a lawyer can give to his client is “avoid the ELRC at all costs; you are better off settling with the employee even if the law says you should not pay”.

END
©William Maema
Nairobi, 14th September, 2016
IKM Advocates is a member of the DLA Piper Group, an alliance of leading independent law firms working together in association with DLA Piper, both internationally and across Africa.

Copyright © 2016 DLA Piper. All rights reserved. | SEP16 | 3151520