

# Salient Features on the Law of Employment Kenya



## Introduction

Socio-economic rights have been established for everyone and include rights to housing, education, health care, water, and food and socio security. However inequality and poverty remain deeply entrenched in the society and it has been realized that employment is the number one priority in efforts to reduce inequality and to improve access to resources for the majority of the populations. Employment offers a cash income that will enable people to pay for the goods and services that secure their socio-economic rights.

Towards accessing employment, several initiatives have been put into place by the Government to enable and facilitate reasonable rights, equity and equality for job seekers. The policy and legal is one of the major components that facilitate access to employment matters and the Constitution upholds several provisions. The Constitution article 2 states that general rules of International law and treaties or convention ratified by Kenya shall for part of the law of Kenya.

The **International Labour Organization** through the Employment Policy Convention No. 122 of 1964 requires member countries to priorities and pursues active policies designed to promote full, productive and freely chosen employment. In 1999 the ILO launched the decent work agenda to which Kenya is a signatory and assigned propounded the following pillars; employment opportunities, worker rights, social protection and representation.

The pillars have been reaffirmed by the **Constitution of Kenya** that recognizes that employees are entitled to basic human rights protections, including freedom from discrimination and the right to equality and fair labour practices. It prohibits child and forced labour as well as slavery. Article 41 grants all persons the right to fair labour practices. It guarantees every worker the right to fair remuneration, reasonable working conditions, form, join or participate in trade union activities and programmes and undertake strike action.

Owing to the fact that socio-economic rights are dependant to earning a living, Article 43 provides for economic and social rights which include the right to social security. This indicates for equality in access to employment opportunities as rights are promoted simultaneously with fundamental rights at work, adequate income from work, representation and security of social protection.

## Laws on Labour

Employment is governed by the general law of contract thus principles of common law making employment be seen as an individual relationship negotiated by the employee and the employer according to their special needs. A number of laws have been passed to deal with the different aspects of employer-employee and include;

- Employment and Labour Relations Court Act, 2011 (no. 20 of 2011) this Act sets out its objectives, composition, jurisdiction and procedure. It was previously referred to as the industrial court Act but was later renamed

pursuant to the Statute Law (Miscellaneous Amendments Act, 2014 published in the Special Gazette Supplement No. 160 (Acts No. 18 of 2014).

- 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).
- 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).
- 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).

## General Provisions on Employment

This document will take cognizance of the primary law on employment in Kenya. This is the Employment Act, 2007 (no. 11 of 2007). It replaced the previous employment Act (cap. 226). It has several provisions and below is some of the salient features. The Act stipulates that it is the duty of the Minister, labour officers and Industrial Court to promote equality of opportunity, promote and guarantee equality of opportunity for a person who is a migrant worker and strive to eliminate discrimination in any employment policy or practice. Limitation of filing a complaint to a labour officer not later than three years after the allegedly unlawful deduction has been made.

**Employers are not to discriminate**, directly or indirectly, against any employee or prospective

employee or harass an employee or prospective employee on the ground including HIV status or in respect of recruitment, training, promotion, remuneration or any matter arising out of the employment. Violation is a criminal offence. Further into discrimination, **Sexual harassment** of any kind is an outlaw and employers should take steps to protect employees against it. In instances of 20 or more employees, is to in consultation with the employees of their representatives issue a policy statement on sexual harassment which is to be brought to the attention of every person by employer's direction.

**Child employment** is where the party providing the service is a child whether the person using the service does so directly or by agent. A person may make a complaint to a labour officer or a police officer of the rank of an inspector and above if that person considers any child to be employed in any activity which constitutes worst form of child labour. No person is to employ a child who has not attained the age of thirteen years whether gainfully or otherwise in any undertaking. A child between 13 to 16 years of age may be employed to perform light work as defined by the Act.

No person is to employ a child of between thirteen and sixteen years of age other than one serving under a contract of apprenticeship or indentured leadership in accordance with the provisions of the Industrial Training Act in an industrial undertaking to attend to machinery. A child is not to be employed in any opencast workings or sub-surface workings that entered by means of a shaft or adit. No person is to employ a child in an industrial undertaking between the hours of 6:30pm and 6:30am though a male young person may be employed in case of emergencies. An employer who a child shall keep and maintain a register containing the particulars of every child he employs.

**Part X that is about employment management** applies to an employer who employs 25 employees or more. It provides that the employer is to notify the Director of Employment of every vacancy occurring in his establishment business or work place. Vacancy is deemed to occur on the date an employer creates a post or when an employee is terminated. Once filled, the employer is to notify the employment service office of this in writing within 2 weeks of the filing of the post. Notification of termination of employment is to be done within two weeks of the termination or lay-off. Contraventions of any provision are an offence.

**In case of death** the employer is to give notice of death in the prescribed form to the labour officers when death of employee from any cause is brought to the knowledge of the employee's employer.

## Employee-Employer engagement

**Contracts are either oral and/or written.** A contract of service for a period or a number of working days which amount 3 months or more must be in writing. The contract must indicate the particulars of employee as indicated in the act section 10 and ought to be signed. If not stipulated within the contract then they could be indicated within the policies guiding the contracts with a statement within the contract. In cases where conditions are more favorable within the contract than those in the Act then the contract prevails.

**Records of an employee** are to be maintained for a period of at least 5 years after the termination of employment. Oral changes should be indicated within the written particular at least 1 month after the changes. Where an employer does not give an employee a statement as required under section 10, 12 and 13 aforesaid or an itemized pay statement required under section 20 of the Act the employee may file a complaint with the labour

officer. Section 11, 12 and 13 refers to a document or collective agreement which is reasonably accessible to an employee.

**Advancement of loans** to an employee in excess of the amount of 1 month his wages or in case of an employee with written contract 2 months wages the excess is not to be recoverable in a court of law. This implies that if an employer advances any loan to employee, the employers is to be obliged to take a separate security from the employee to secure the repayment. No employer is to limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.

**Pay statements** either at or before the time of payment of the salaries and wages of an employer is required to be given to every employee except a casual employee or an employee engaged on period not exceeding 6 months an itemized. Should contain; gross amount of the wages or salary or the employee, itemized statutory deductions and net pay. A non-resident employer may be required by the Minister to pay a bond assessed at the equivalent of 1 month's wage of all the employees employed or to be employed by such employer. Contravention is an offence

**Regulation of the working hours** is to be at least one rest day in every period of seven days. An employee is entitled to 21 working days of leave with full pay within a year. An employee is also entitled to leave as per the act completion of two or more consecutive months of service. After 2 consecutive months of service with his employer an employee is to be entitled to sick leave of not less than 7 days with full pay and thereafter to sick

leave of 7 days with half pay in each period of 12 consecutive month of service subject to the production by the employee of a certificate of incapacity to worked signed by a duly certified medical practitioner. Women employees are entitled to three months maternity leave with full pay besides the normal annual leave aforesaid. On the other hand male employees are entitled to 2 weeks paternity leave.

**Reasonable housing** is to be provided either at or near to the place of employment or is to pay to the employee such sufficient sum as rent in addition to the wages/salary of the employee as will enable the employee to obtain reasonable accommodation. Further, **Medical treatment** is to be provided to employees during time of service and if possible medical attendance during serious illness.

**Foreign contract of service** is to be in the prescribed form, signed by the parties thereto and is to be attested by a labour officer. The labour officer is to be satisfied that; the consent of the employee to the contract has been obtained, of the absence of any fraud, coercion or undue influence and any mistake of fact or misrepresentation which might have induced the employee to enter into the contract, that the contract is in the prescribed form, terms and conditions of employment in the contract comply with the Act, employee is medically fit and employee is not bound to serve under any other contract of service during the period provided in the foreign contract. A person who employ, engages or knowingly aids in the employment or engages of a person with the intention that when so employed or engaged that person is to proceed outside the limits of Kenya or induces or attempts to induce an employee to proceed outside the limits of Kenya unless a foreign contract has been entered into, the person has committed an offence.

## Subjects on termination of service

**Termination of service** may be without notice upon payment to the other party of the remuneration which would have been earned by that other party or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions. Causal employee is to be deemed to be one where wages are paid monthly. The employee is deemed to be entitled to one paid rest after a continuous six days working period and such rest day or any public holidays which falls during the period under consideration is to be counted as part of continuous working days. A contract expiring on a journey may be extended for a sufficient period to enable the employee to complete the journey but not exceed one month.

Termination on the grounds of misconduct poor performance or physical incapacity, there is need to explain to the employee in a language the employee understands, the reasons and the employee is entitled to have another employee or a shop floor union representative of his choice present his explanation. Employer is before terminating the employment of an employee or summarily dismissing an employee hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person if any chosen by the employee.

Probationary period for a new hiring or employee should not exceed six month and the probationary contract of employment can be terminated by a seven days written notice by either party. In any claim arising from termination of a contract of employment, the employer must prove reason or reasons for the termination of employment. If he fails to do so he is to be deemed to have terminated the employee unfairly. An employer is

to issue to an employee a certificate of service upon termination of his employment unless the employment has continued for a period of less than four consecutive weeks. An employer is to keep a written record of all employees employed by him with whom he has entered into a contract. An employer is to permit an authorized officer who may require an employer to produce for inspection the record for any period relating to the preceding 36 months to examine the record. False entries are a criminal offence.

The labour officer or Industrial Court is to consider the procedure adopted, conduct and capability of the employee, the extent to which the employer has complied with any statutory requirements connected with termination, the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee. In case of a summarily dismissal or unfairly termination his employment without justification the employee may within three months of date of dismissal present a complaint to a labour officer and the complaint is to be dealt with as complaint lodged. A right of an employee to make a complaint is to be in addition to any right an employee may enjoy under a collective agreement. The burden of proof for unfair termination of wrongful dismissal is to rest on the employee while the burden of justifying the grounds is to be on the employer

**Redundancy** is the loss of employment through no fault of the employee. It is due to the employee's services being unnecessary as a result of downsizing;

-Employee member of a trade union the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date

of the intended date of termination on account of redundancy;

-Not a member of trade union, employer notifies the employee personally in writing and the labour officer;

-Employer has in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

-Where a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

-The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

-The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

-The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service. Redundancy is not to apply in cases of insolvency.

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

A gratuity is a terminal benefit like a provident fund or pension scheme that is intended to help a worker after termination. A worker is entitled to a gratuity when it is expressly stated in the employment contract. A worker must have served for at least five years at the time of termination

before being eligible to gratuity. Gratuity and pension schemes are not one and the same. In the case of pension schemes, both the employer and the worker makes contributions; the scheme operates as a savings kitty for the worker upon retirement. The funds within the pension scheme are only accessible to the worker upon attainment of retirement age.

The Employment Act requires employers to provide for pension schemes for their workers within their contracts of service. On the other hand, gratuity is an ex gratia payment by the employer to the worker for dedicated service provided for a period of more than five years prior to termination. It is not mandatory in the law for the employer to pay the worker gratuity.

**Summary dismissal** is to take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by statutory provision or contractual term. 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. Justifiable grounds include;

- Without leave absents himself from the place appointed for the performance of his work;
- During working hours, intoxicated, unwilling or incapable to perform his work properly;
- An employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly;
- An employee uses abusive or insulting language or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

-An employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey issued by his employer or a person placed in authority over him by his employer;

-Under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

-An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

An employee continuously employed by his employer for a period not less than 13 months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. **Unfair termination includes;**

- The employer did not apply justice and equity in terminating the employment of the employee;
- A female employee's is pregnant or any reason connected with her pregnancy;
- The going on leave of an employee or the proposal of an employee to take any leave to which he was entitled under the law or a contract;
- An employee's membership or proposed refusal to join or withdrawal from a trade union;
- An employee's race, colour, tribe, sex, religion, political opinion or affiliation national extraction, nationality, social origin, marital status, HIV status or disability;
- An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or
- An employee's participation in a lawful strike.

**Remedies of unfair or wrongful dismissal;**

- Wages are paid to the employee as per what he was entitled to under his contract of service.

- Losses consequent upon dismissal of service.
- Payments subject to statutory deductions.
- Labour office may require reinstatement of the employee.
- Treatment as if he had not been terminated.
- Re-engagement of work comparable to what he was doing prior to his dismissal.

**Insolvency of employer** is defined as;

- Employer has been adjudicated bankrupt or has made a composition or arrangement with his creditors,
- Employer has died and his estate is to be administered in accordance with the Law of Succession Act.
- Company has been wound up or administration order has been made or a resolution for voluntary winding up has been passed.
- Receiver or manager has been appointed or possession has been taken by or on behalf of the holder of any debentures secured by a floating charge of any property of the company comprised in or subject to the charge.

**Insolvency includes the following;**

- Arrears of wages for not more than six months.
- Any amount which the employer is liable to pay the employee for the period of notice or for any failure of notice.
- Any pay in lieu of leave for annual leave days earned but not taken.
- Any basic award of compensation for unfair dismissal.
- Any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice.

For purposes of processing any debt payment, the following officers are crucial; a trustee in bankruptcy or a permanent or interim trustee, a liquidator, an administrator, a receiver or manager and a trustee under a trust deed for his creditors executed by the employer.

## Court Proceedings

The Constitution promotes enforcement of the employment rights by providing for the establishment of the Industrial Court. Through article 162 the **Industrial Court Act** was established revamping the Industrial Court that has the same status of the High Court. It is bestowed with powers to adjudicate over cases of employment and labour relations. It described the qualifications, remuneration and security of tenure of the judges of the Industrial Court. It further establishes an Employment and Labour Relations Rules Committee for Purposes of making rules for the Court in consultation with the Chief Justice.

In support to enforcement, the Employment Act has defined the modes of settling disputes within employment complaints. It provides that aggrieved parties may complain to the labour officer or lodge a complaint or suit in the Industrial Court. No civil action or proceedings based or arising out of this Act or a contract of service in general is to lie or be instituted unless it is commenced within 3 years next after the act neglected or default complained or in the case of continuing injury or damage within 12 months next after the cessation. In a labour dispute there is always the Claimant, who files the case, and the Respondent, who defends the case.

A suit is instituted when a claim is filed in the Industrial Court by filing a statement of claim or memorandum of claim. The memorandum/statement of claim outlines the particulars of the parties and reasons for the cause of action. It sets out the **grievances, any attempts to settle the problem out of court, submissions of the parties and prayers being sought from the Industrial Court**. The memorandum/statement of claim must be accompanied by a verifying affidavit sworn by the Claimant before a Commissioner for

Oaths with supporting documents. Respondent should file a reply to the memorandum of claim upon service. Thereafter a date is taken for directions before the Judge in Industrial Court.

Unlike ordinary courts, an employee and employer need not be represented by advocates. A trade union representative or employer's organization is allowed to appear before the Industrial Court on behalf of an employee or employer respectively. Upon hearing a dispute, the Industrial Court can make awards for damages, compensation, orders of declaration, reinstatement of an employee, injunctions among others. If a person is aggrieved by the decision of the Industrial Court, a right of appeal lies in the Court of Appeal.