

**THE KENYAN WORKER
AND
THE LAW**

**AN INFORMATION BOOKLET ON
LABOUR LAW**

Foreword



Labour rights is one of the core thematic areas that Kituo Cha Sheria (Kituo) operates in pursuit of their vision of a just and equitable society. This has been through legal advice and litigation as well as through policy advocacy and education. During this period Kituo has received numerous complaints from workers regarding their terms and conditions of employment. It is Kituo's experience that the ordinary Kenyan worker lacks basic knowledge about his or her rights as a worker. Similarly employers are equally unaware of their obligations to their workers. This booklet is designed for workers, employers as well as anyone else who wants to know and understand the law in Kenya as it relates to labour and labour relations.

In the year 2007 there was a review of the national labour laws which had been a concern to both the Kenyan public and the Government for a long time. This arose out of tremendous changes experienced in the local labour market such as; structural adjustments, liberalization of the economy and technological innovations. The review was aimed at ensuring the laws were responsive to contemporary economic and social changes as well as achieve a new set of reformed updated labour legislation through a coordinated consultative process.

The following six (6) core labour statutes were comprehensively reviewed and repealed in that process.

- 1) The Employment Act, Cap 226;
- 2) The Regulation of Wages and Conditions of Employment Act, Cap 229;
- 3) The Trade Unions Act, Cap 233;
- 4) The Trade Disputes Act, Cap 234;
- 5) The Factories and Other Places of Work Act, Cap 514; and
- 6) The Workmen's Compensation Act, Cap 236.

After that review exercise, 5 new pieces of legislation were enacted. These were:

- 1) The Employment Act, 2007
- 2) The Labour Relations Act, 2007



- 3) The Occupational Safety and Health Act, 2007
- 4) The Work Injury Benefits Act, 2007
- 5) The Labour Institutions Act, 2007

Each Act incorporated the principles of the 1998 ILO Declaration on Fundamental Principles and Rights at Work; thus ensuring the basic human values that are vital to our social and economic development. The Right to Work is catered for in Kenyan laws.

Article 41 in the Constitution of Kenya 2010 on Labour relations and the establishment of the Industrial Court through the Industrial Court Act No. 20 of 2011 with the same status as the high Court, further enforces and guarantees labour rights providing a better environment for pursuing labour Cases. Kituo urges for vigilance and implementation of labour laws.

It is Kituo's hope that this booklet will help workers and employers alike to better know, understand and protect workers' rights and labour law.

Acknowledgements



We wish to convey our sincere gratitude to all who have contributed towards the compilation of this edition of the labour laws booklet.

Our appreciation and special gratitude goes to the Board and Executive Director of Kituo cha Sheria Priscilla Nyokabi who have tirelessly supported, protected and promoted the rights of workers across Kenya.

Special thanks goes to those who researched, wrote and made inputs to enrich this booklet namely Sasha Werblin, Annette Mbogoh, Kigen Korir and Jackline Mwendu. The Research, Communication and Documentation Department (RCD of Kituo cha Sheria and particularly Tobias Mwadime and Otiato Guguyu for their exceptional work in editing and production of the booklet.

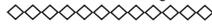
Special gratitude goes to our volunteer advocates and community paralegals who validated the content of this booklet.

To the entire staff of Kituo cha Sheria in Mombasa and Nairobi offices for readily offering assistance when needed.

Thank you all.



Glossary



Child - Anyone person under 18 years of age.

Collective Agreement - A registered agreement concerning any terms and conditions of employment, apprenticeship, or indentured servitude made in writing between a trade union and an employer, a group of employers or employers' organizations.

Contract of Service - An oral or written agreement to employ or to serve as an employee for a period of time

Disability - A physical, sensory or mental incapacity

Employee - A person who has been employed for wages or a salary and includes an apprentice or indentured learner

Employer - Any person, including the Government, who employs or has employed an employee and where appropriate includes-(a) an heir, successor, assignee or transferor of an employer; or an agent, director, or any person authorised to represent an employer.

Forced or compulsory labour - All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily. It excludes compulsory military service.

Redundancy - The loss of employment through no fault of the employee. Typically this termination is due to the employee's services being unnecessary as a result of downsizing.

Remuneration - Money paid for a work or service.

Trade union - An association of employees whose principal purpose is to regulate relations between employees and employers, including an employer's organisation.

Summary Dismissal - Termination of employment by employer with no prior notice, or with less notice than prescribed by the contract of service or by law due to the employee breaking his/her agreement under contract of service.

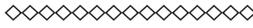
Permanent Disablement - Permanent injury or disfigurement.

Temporary Disablement - A temporary condition that took place while at work, which results in the loss of wage-earning capabilities at the work place.

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Introduction



Labour law in Kenya is derived from several sources including the Constitution, Acts of Parliament and subsidiary legislation and International Conventions. This booklet will briefly highlight the significant laws as they relate to workers. While we recognize that many questions and issues related to labour are complex and may require further information, it is our belief that basic education about one's rights is the first step toward protecting one's rights.

Labour Laws in Kenya:

There are seven major sources of law governing employment laws in Kenya. These are:

1. The Constitution

Article 27 provides for the right to equality and freedom from discrimination. It states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 27(4) of the Constitution states that “the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

More specifically, Art 41 provides for labour relations. It states that every person has the right to fair labour practices. Under the Constitution, every worker has the right:

- To fair remuneration;
- To reasonable working conditions;
- To form, join, or participate in the activities and programmes of a trade union; and
- To go on strike.

The procedure for going on strike is clear. It is however not provided in the Constitution. The employees are required to provide due notice to the employer on their intention to go on strike and the reasons behind their such action. Once the notice is expired and their grievances have not been met, the employee has a right to proceed with the strike.

The Constitution also provides for the rights of employers. Every employer has the right:

- To form and join an employers organisation; and
- To participate in the activities and programmes of an employers organisation.

The rights of a trade union and employer's organisation have also been laid out as:

- To determine their own administration, programmes and activities;
- To organise; and
- To form and join a federation.

2. The Employment Act of 2007

This Act establishes the minimum terms and conditions of employment. The Act sets forth the relationship between an employer and a worker. It defines the benefits, duties and obligations of the employer and the worker, which includes: contract of service, prohibition against forced labour, discrimination in employment, sexual harassment, payment of wages, leave, termination, and living amenities.

3. The Labour Institutions Act of 2007

This Act establishes the National Labour Board, the Committee of Inquiry, Labour Administration and Inspection, the Wages Council and Employment Agencies, which work to enhance institutions and bodies that establish the regulations that govern Kenyan labour relations. The Act provides definitions for collective agreement, contract of service, employee, employer, Trade Union, redundancy, and other pertinent terms embedded within the Labour laws.

4. The Work Injury Benefits Act of 2007

This Act provides for the International Labour Organization convention compliant laws pertaining to employee compensation in the work place. Following enactment of this Act, many of the sections were annulled by the High Courts finding them unconstitutional.

5. The Labour Relations Act of 2007

This Act is primarily concerned with the freedom of association of employees and employers, and the right to collective bargaining. The Act provides legal guidelines for the establishment of trade unions and employer's organizations and their functions.

6. The Occupational Safety and Health Act of 2007

The objective of this Act is to provide the legal framework for employers to maintain healthy working conditions and environment for their workers. The Act makes provisions for the safety and health of all workers in Kenyan workplaces and establishes the National Council for Occupational Safety and Health.

7. The Industrial Court Act No. 20 of 2011

The Act establishes a revamped Industrial Court that is the same status of the High Court as espoused in the Constitution of Kenya. The Industrial Court is established as a court of superior record. The Court is given powers to adjudicate over cases of employment and labour relations. It describes 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.

Note: Copies of all of these Acts can be purchased from the Government Press. The Government Press is located on Haile Selassie Avenue next to Kenya Polytechnic in Nairobi. P. O. Box 30128 (Telephone No. 226596). They can also be accessed online at the Kenya Law Reports website www.kenyalaw.org

International Conventions and Treaties:

Kenya as a member of the International Labour Organization has ratified a number of important Conventions related to the rights of all workers. As a signatory to these conventions, the Kenyan government is legally obligated to ensure that these rights are protected and applied in Kenya.

These fundamental rights include:

The right to form and join a trade union and participate in its activities. This includes the right to wages and the conditions of employment to a standard set by law and/or a collective bargaining agreement. (Convention Nos. 87 and 98)

The right to be free from forced labour including the right to be free from slavery, forced bondage and forced labour without pay. Convention Nos. 29 and 105)

Types of Workers

Workers may be classified into three main categories.

1. Permanent worker:

Is a person who signs a written employment contract that identifies he or she as a permanent worker. It also includes a person who does not have a written contract but who is paid at the end of thirty days.

Is expected to work for a probation period, generally from one to three months, before he or she is confirmed and can claim benefits.

Is required, in the event of resignation, to give at least one month's notice or one month's salary in lieu of notice.

In the event of termination, is entitled to one month's notice or one month's salary in lieu of notice unless the worker is dismissed summarily.

2. Casual worker:

Is a person who works for a short period of time generally not more than twenty-four hours at a time and is paid at the end of each day.

Has no guarantee of being employed more than twenty-four hours and can be dismissed at only one day's notice.

3. Fixed-term contract workers:

Is a person employed for one determined fixed period of time which is more than one day. Entitlements are determined by the terms of the contract entered into with the employer or a collective bargain agreement.

Any employment of three months or longer should have his or her contract in writing.

Underlying Principles of Employment

The relationship between a worker and the employer is based on a contract. Both the worker and the employer should agree upon the terms of employment

before the worker begins his or her term of service.

If a worker joins a union, the terms of employment may be negotiated as part of a collective bargaining agreement.

It is important to know that an employer cannot impose terms of employment on a worker that are less than the minimum terms required by law.

Every worker hired for a sum of three months or more must be given a written contract of employment by the employer. It is the legal obligation of the employer to draw up the contract. To signify the workers consent, both the worker and the employer must sign the employment agreement or imprint an impression of his/her thumb, or any finger, in front of someone other than the employer.

Every worker MUST make certain that he/she receives the written terms of his/her employment. A worker who does not have a letter of appointment or a written employment contract will find it difficult to prove a right to benefits in the event he/she pursues court proceedings.

Legal Duties of Every Worker

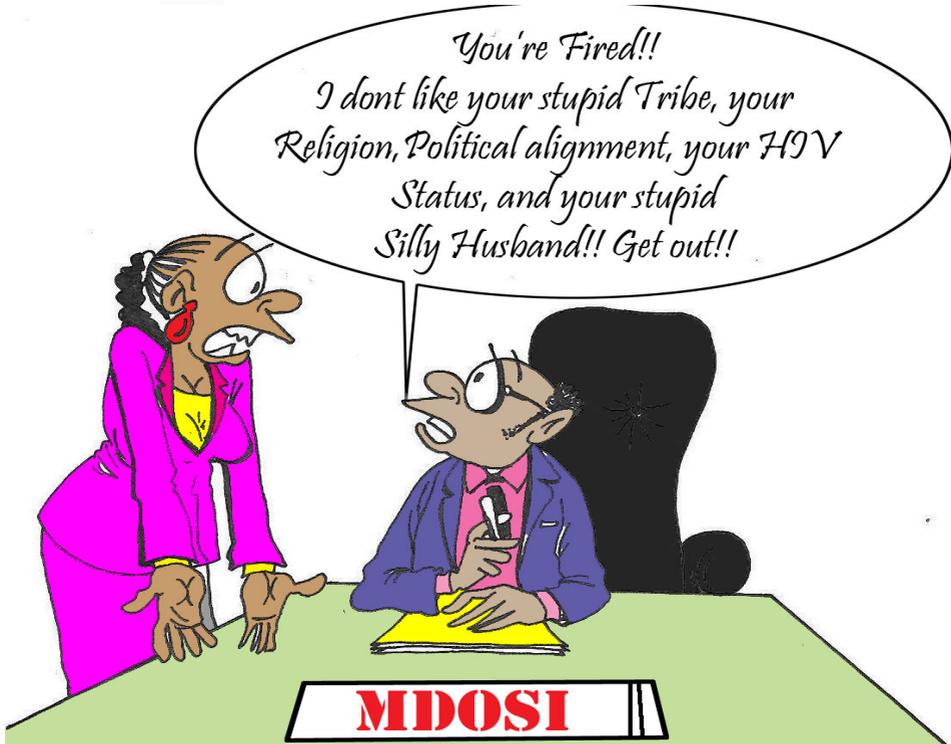
Every worker must adhere to the following rules. A worker who fails to follow these rules may be dismissed.

1. Arrive at work on time and carry out his/her assigned work fully and responsibly.
2. Perform all lawful tasks or assignments that are within the scope of the worker's job description.
3. Not drink alcohol or other intoxicating and illicit drugs during working hours.
4. Not use abusive language or behaviour at the workplace.

Discrimination in Employment

Part II, Section 5, of the Employment Act states that no employer may directly or indirectly discriminate against an employee or potential employee or harass an employee or potential employee on the grounds of: race; colour; sex; language; religion; political or other opinion; nationality; ethnic or social origin; disability; pregnancy; mental status or HIV status. This may be with respect to: recruitment; training; promotion; terms of conditions of employment;

termination of employment or other matters arising out of employment.

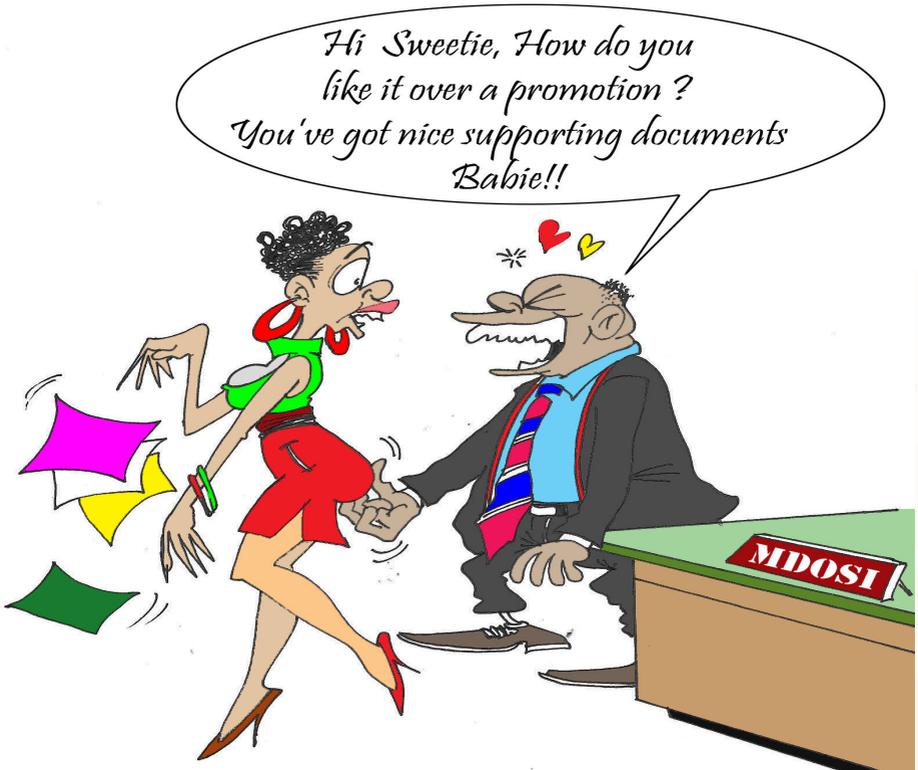


Sexual Harassment

The law states that every employee is entitled to employment that is free of sexual harassment. An employee is sexually harassed if their employer, a representative of their employer or a co-worker commits any of the following:

- Directly or indirectly requests sexual intercourse, sexual contact or any additional form of sexual activity that contains and implied or expressed promise of special or detrimental treatment in the workplace, or threatens the current or future working status of an employee;
- Uses either written or spoken sexual language;
- Uses visual material of a sexual nature;

- Jeopardises the job performance, job satisfaction or general wellbeing of the employee in the work place by displaying direct or indirect physical sexual behaviour that is unwanted and insulting.



If more than 19 employees reside in a single work place, the employer must consult with employees or their representatives if they exist and issue a policy statement on sexual harassment in the work place. This document must be brought to the attention of each employee and must include the following information:

- The definition of sexual harassment as specified in Part II, Section 6, subsection (1) of the Employment Act (also stated above);
- A statement explaining:
 - Every employees right to a sexual-harassment-free

workplace, with an assurance that the employer will take all necessary steps to make certain that no employee is subjected to sexual harassment in the work facility;

- In the event that an employee is subject to sexual harassment, the employer will take disciplinary action as deemed appropriate;
- How to bring issues of sexual harassment in the workplace to the attention of the employer;
- That the employer will keep all names included in reports of possible sexual harassment confidential, unless disclosure is necessary for the purpose of investigating a complaint or taking disciplinary measures.

Prohibition Against Forced Labour



The law states that it is illegal to use or assist any person in the recruitment, purchase and sale or use of forced labour. This includes the recruitment or compulsory employment of children.

Wages and Salary

Under the law, every worker is entitled to receive full payment for work done. Full pay includes wages, which are payments made on an hourly, daily, weekly or piecemeal basis. Full pay may also be in the form of a salary, which is a fixed payment made on a monthly basis for professional or office work.

The amount of full pay cannot be less than the standard minimum rate which is set forth in the Employment Act. On the date of payment, the employer must give each worker a pay slip stating all earnings due and any deductions made for that pay period. All wages must be paid in Kenyan shillings. However, a worker can request in writing that the employer pay wages either by cheque or by crediting the wages to the worker's bank account. When a worker is absent, the employer with permission from the worker may pay the wages to another person appointed by the worker. Generally, payment of wages is on a working day and during working hours. Wages must be paid at or near the place of employment, or at a place agreed between both parties. This place of payment cannot be in a place where intoxicating liquor is sold or available for supply, except for parties employed to work in such an establishment. However, exceptions may apply in the following situations:

- Piecework is paid at the end of the month in proportion to work completed.
- A casual worker is generally paid at the end of each day, unless the worker requests otherwise.
- If employed for a period exceeding a month, payment is due at the end of each month.
- Workers employed for an indefinite length of time, payment is due at the end of the agreed contract, or at the end of the month.
- In case of summary dismissal, wages are paid up to the date of dismissal. In addition to wages, every permanent worker is entitled to a housing accommodation or housing allowance. The rates for housing allowances are found in the current Year's Wage Orders, which are available at the Government Printer.

Deductions from Wages

Other than the statutory deductions, an employer is generally not allowed to make any deductions from an employee's wage. However there are several exceptions.

If the worker is absent from work without leave, the employer can deduct wages equal to the amount of time when the worker did not work.

An employer may deduct any contributions by a worker to his or her retirement or provident fund.

If a worker damages/loses goods or money at the workplace, the employer may deduct the value of the lost goods or money from the worker's wages.

Salary advances or loans can be deducted from a worker's wages.



NOTE: An employer **MAY NOT** make deductions from wages as a form of punishment. Moreover, the total amount of deductions in a wage period shall not exceed two thirds of the worker's total wages.

Statutory Deductions

Every employer is required by law to deduct from each worker's wages a certain amount required to pay the National Social Security Fund (NSSF), National Hospital Insurance Fund (NHIF) and Pay as Your Earn (PAYE).

National Social Security Fund (NSSF)

The NSSF is a social security measure that encourages workers to save a portion of their present earnings and contribute it to a retirement or pension fund. Both the worker and employer are required to contribute to the Fund. All permanent workers must pay contributions to NSSF. At the time of printing, the worker and the employer contribute Kshs 200 each, totaling Kshs 400, towards the NSSF.

Generally, casual workers do not benefit from this scheme and therefore do not have to pay into it.

In addition to NSSF, government employees are also entitled to participate in a government pension scheme.

A worker is entitled to receive payments from the NSSF Fund after he/she reaches the age of 65 years and has retired from regular employment. However, a worker can now access his or her NSSF contributions before the retirement age by supplying a letter of appointment, termination letter and a declaration that is not able to continue making the contributions.

A worker who is forced to retire because he or she is suffering any physical or mental incapacity can also benefit from this Fund.

Every employer is obligated to pay into the Fund both his and the worker's contribution. If an employer fails to make these payments, he is guilty of a criminal offense punishable by law. A worker should immediately report the offence to the NSSF Headquarters, which is located at the Social Security House, Bishops Road or NSSF Building, Nkrumah Road, Mombasa or any other of its provisional offices.

Every worker has the right to know if his/her employer has paid into the Fund and may write to the NSSF and confirm the employer's payment.

Note: This is a statutory requirement for any employer who employs five (5) or more workers.

Pay As You Earn (PAYE)

It is every employer's legal duty to deduct income tax from the pay of his employees. Thus all employees, whether paid weekly wages, a monthly salary, annual salary, bonus, etc. must pay this tax. For example, in the year 2001, any permanent worker whose gross pay exceeds 9,600 shillings is subject to this tax. In addition, casual workers who are employed for one month or less do not have to pay this tax. Any employer who does not deduct PAYE from workers wages is committing a punishable offense. The income tax deduction amounts are set each year and can be obtained at the Government Printers.

Note: This is a statutory requirement.

National Hospital Insurance Fund (NHIF)

All workers can make contributions to this fund to offset medical bills for when a worker is admitted as an in-patient to any hospital, nursing or maternity home that has been recognized by the government under this Act. The worker who contributes to this Fund is issued a national hospital insurance card for each financial year, which will show his up to date payments. The employer retains this card and should remit all contributions to the fund promptly every month. The proposed NHIF contributions that at the time of print raised a lot controversy are: Less than 5,999 will pay 150.00; Over 100,000 will pay 2,000.00; Self Employed 500.00; Indigents (Voluntary) 300.00. The current NHIF contribution is monthly flat rate of Kshs 320.00.

Working Hours

The normal working hours shall be forty eight hours during a six-day work week (8 hours per day). Certain types of workers such as watchmen, herdsman and caretakers may be required to work up to ten hours a day or sixty hours a week.

Generally, child labour is prohibited. However a child may be engaged to work where the work benefits the child's education and well being and does not interfere with his/her education. A child who is aged sixteen or younger should not work more than six hours in one day.

Every worker must be given at least one full day off each week for rest.

Overtime Payment

Overtime is any period worked in excess of the regular working hours.

An employer must give the worker 24 hours' notice for overtime requests. A worker cannot be forced to work overtime and should be adequately compensated for any overtime work.

Overtime pay is one and a half times the worker's normal hourly rate for any time worked over the normal working hours. If the overtime is on the worker's normal rest day or public holiday, overtime pay is twice the normal hourly rate.

If the worker is not employed by the hour, the basic hourly rate is deemed to be one-two hundred and twenty-fifths (1/225) of the employer's monthly wage. A worker cannot be asked to work more than one hundred and sixteen (116) hours in any consecutive two-week period. For night workers, it should not exceed one hundred and forty-four (144) hours for two consecutive weeks. An employer can offer time off in place of overtime pay if the worker agrees in writing.

Types of Leave

Annual Leave

Every employee is entitled to at least twenty-one working days of leave after completing twelve consecutive working months.

If an employee is terminated after working at least two consecutive months, he or she must be given at least one and three-quarters (1 $\frac{3}{4}$) days of paid leave for each completed month of work. A worker is not entitled to this leave if he was summarily dismissed.

Public holidays and sick leave days are not counted as leave days. Public holidays with full pay are: New Year's Day, Good Friday, Easter Monday, Labour Day, Madaraka Day, Idd-ul-Fitr, Mashujaa Day, Jamhuri Day, Christmas Day, Boxing Day and any gazetted public holidays.

Some industries (such as the hotel, catering, security and others) give workers a leave travelling allowance.

Sickness and Sick Leave

A worker who becomes ill while at work should take all reasonable steps to inform his/her employer of the illness.

Once an employer is informed of a worker's illness, the employer must provide him/her with the proper medical attention.

After completing two consecutive months of work, a permanent worker is entitled to at least seven days of fully paid sick leave. Thereafter, a worker is entitled seven days of sick leave with half pay.

To obtain paid sick leave, a worker must produce a certificate of incapacity to work signed by a qualified medical personnel.

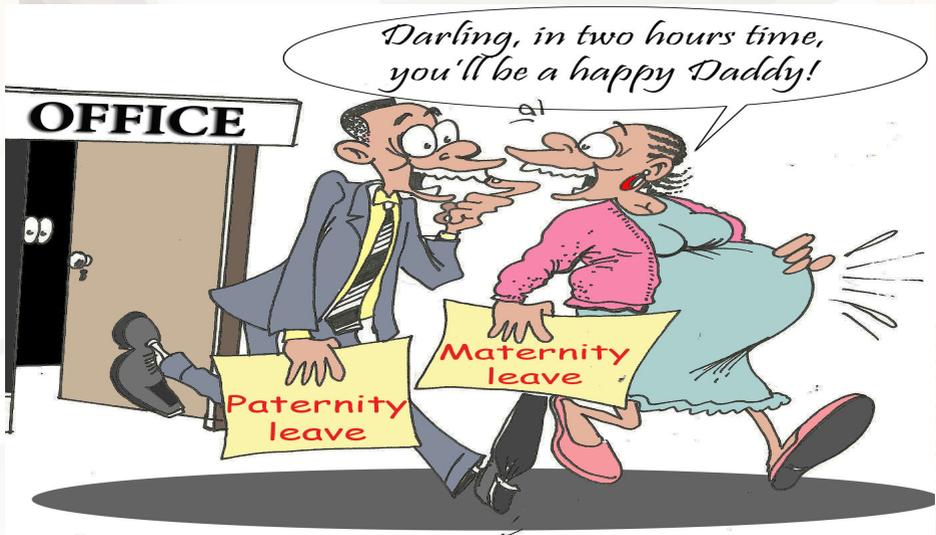
If a worker has an accident while at work and the accident is not due to the worker's wilful misconduct or neglect, the employer must pay the worker the full salary for the period he/she is absent from work until the worker is certified incapable of returning to his or her employment.

Maternity and Paternity Leave

A woman has a right to take three months maternity leave with full pay. To be entitled such rights, a female employee must give written notice, no less than seven days in advance at which date she intends to leave and return to work.

A woman who has taken maternity leave cannot in the same year claim annual leave unless the employer agrees in writing. A woman taking maternity leave does not lose any of her benefits or previous job during that period.

Male employers also have the right to two weeks paternity leave with full pay.



Health and Safety

The employer must provide a clean and safe working environment for the workers. Every factory must be kept clean and free from all forms of sanitary nuisance. Every factory worker is entitled to the following working conditions:

- Access to an adequate supply of clean water;
- Sufficient fresh air and adequate ventilation;
- Sufficient and suitable lighting;
- Suitable sanitary facilities;
- Adequate accommodations to store clothes worn outside working hours;
- Freedom from overcrowding in the work place;
- Suitable sitting facilities for workers whose work is done standing;
- First aid materials;
- All equipment and machinery must be of sound quality and adequately fenced off to protect workers using or working near such machinery.

The employer must establish and make known to all employees clear rules for the handling of dangerous substances such as poisons and pest control products. Such rules must be in a language that all employees can read and understand.

In addition, the employer must:

- Make sure all dangerous and poisonous substances are properly labelled, packed, stored, handled, used and disposed of.
- Chemical safety data sheets for every dangerous substance must be provided and/or made available to all employees.
- Provide protective clothing including gloves, footwear, goggles and head

coverings where necessary.

- Provide facilities for washing and cleaning necessary to protect people, clothes and equipment.

Adequately instruct and train workers in the use and handling of poisonous or dangerous substances or equipment.

Make first aid facilities available to deal with any emergencies.

On their part, workers have the duty to:

- Ensure his/her own safety and healthy through co-operating with rules and regulations as set by the employer.
- Wear any protective clothing provided by the employer.
- Refrain from eating, drinking, smoking and taking snuff or other intoxicants while on the job.
- Any employer or worker who does not take reasonable care in handling poisonous substances or machinery, and thus endangers others, is guilty of a criminal offence.



Compensation for Injury or Illness

Under the Work Injury Benefits Act, any worker who is injured by an accident at work or becomes ill with a disease caused by work-related activities may make a claim for and be paid workman's compensation. In addition, a personal representative of a worker who dies as a result of work-related accident may make a claim under the Act.

It is important to note that a worker may make a claim for compensation under this Act even if he or she was negligent or responsible for causing the accident.

In addition to a personal injury caused by an accident in the course of the job, an employer must compensate a worker for any disease or ailment acquired as a result of work performance.

How to Claim Compensation:

An injured worker may either file a civil suit for damages under common law against the employer or claim compensation under the Work Injury and Benefits Act. However, if any compensation is received under the Act, the same shall be deducted from the amount awarded in the civil suit.

Unlike a claim brought under the Act, in a civil suit for damages brought by the worker the employer will not be liable for the worker's injury if the employer can establish the worker was negligent or responsible for the accident. If a worker chooses to file a claim under the Act, he/she must report the accident to the employer who within seven days of notice must report it to the Director of Occupational Safety and Health Services.

Under the Act, the employer must also fill in a form known as the LD104, which indicates the circumstances surrounding the injury. In addition, a medical doctor must complete this form indicating the nature and extent of injuries suffered by the worker. Following a medical examination of the worker, the employer should pay to the worker compensation for the injury. The various amounts of payment in case of an accident depend on the type and extent of injury and are set forth in the Act. Note that the following people cannot get compensation under the Work Injury and Benefits Act:

- Non-manual labourers earning more than 48,000 shillings per annum, i.e. 4,000 per month.
- Casual workers who are not part of the employer's business

- People given work to do away from the employer's work premises.
- Members of the worker's family who live on the work premises.
- Members of the armed forces.

Under this Act, a claim for compensation must be reported within a year of the date at which the incident took place, or the claim will not be valid. The Director shall within thirty days of receiving the money claimed for the employee, pay the worker or his/her dependant for the reported damage.

The amount of compensation given to an employee is subject to the degree of injury. These injuries are governed by the Work Injury and Benefits Act and organized as schedules:

- First Schedule- Degree of Disablement
- Second Schedule- Occupational Diseases
- Third Schedule- Dependant's Compensation

Termination of Employment

A worker's employment may be terminated in one of the following ways:

- Termination by the employer for specific reasons (see termination by the Employer below).
- Redundancy.
- Resignation by the worker.
- Retirement of the worker.
- Death of the worker.

Albeit termination by the employee or employer, the following span of time must be adhered to in order to complete a lawful termination of work:

The notice period is dependent on the duration of the pay i.e. if one is paid on a weekly basis the notice period is one week while if one is paid on a monthly basis then the notice period is one month unless otherwise provided in writing.

Termination by the Employer

An employer may not terminate employment without good cause. Employment may be terminated for, among other reasons:-

A worker is incapable of performing the job. After receiving a final letter of warning, the worker continues to commit a breach of discipline; prolonged illness that makes a worker unable to perform his/her normal duties. In this situation the employer generally ends the employment by giving at least one month's notice or the period expressed in the contract (if written).

A worker whose employment is terminated is entitled to receive terminal benefits and any contribution made to a provident fund.

Termination by Employee

An employee may terminate the employment contract by tendering his or her resignation to the employer and giving the employer adequate notice or salary in lieu of notice.

Summary Dismissal by Employer

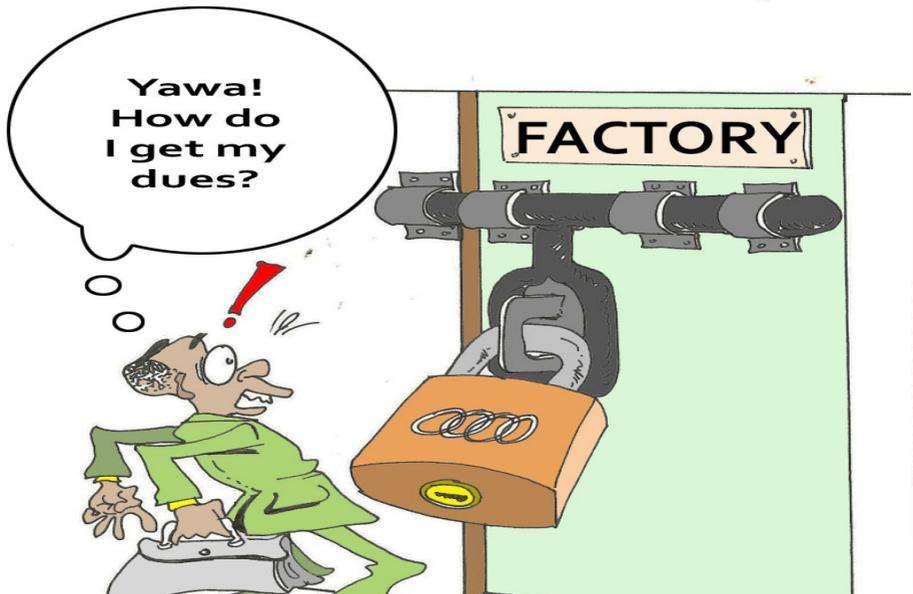
An employee may be summarily dismissed for gross misconduct.



Gross misconduct includes the following kinds of behaviour:

- Absence from the work place without permission of lawful cause
- Being drunk at the workplace.
- Wilfully neglecting to perform any assigned work.
- Use of abusive or insulting language or behaviour in the work place.
- Knowingly failing to obey a lawful and proper command that is within the scope of employment.
- Arrest for a crime punishable by imprisonment, and not released within 14 days.
- Committing a criminal offense against the employer or his property.

Redundancy



In the case of redundancy, the employer must follow the procedure set down by law.

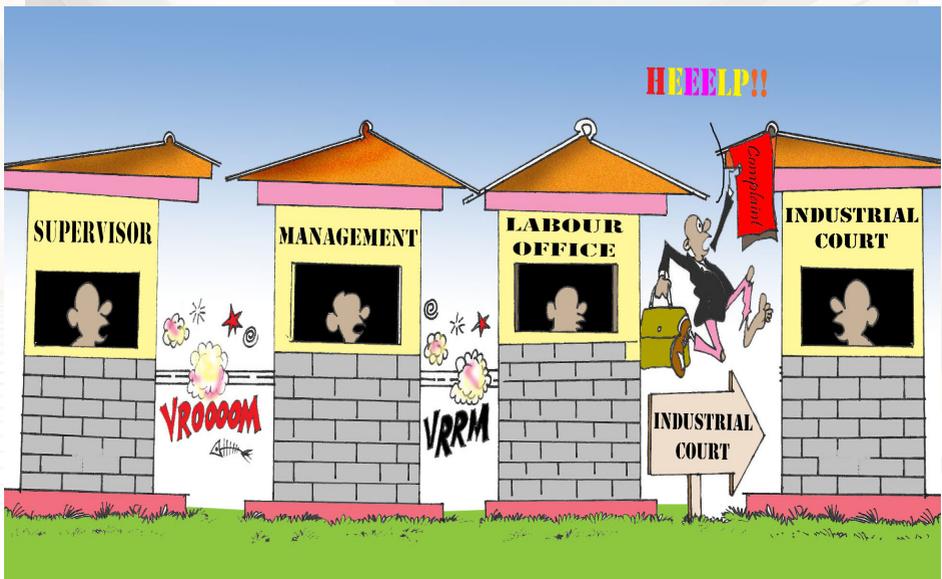
Informing the worker's union or the labour officer in the area of the reasons for the redundancy.

- The redundant worker shall be paid in lieu his or her earned leave days.
- The redundant worker shall be entitled to one month's notice or one month's wages in lieu of notice.
- A redundant worker is also entitled to a severance pay.

Grievance Procedure

Workers who are not members of any union should present their complaints or grievance to their immediate supervisor. In the event there is no action or resolution of the grievance then the worker should then seek audience with the management. If the matter remains unsettled then the worker should file a formal complaint with the labour office nearest to the workplace.

However there are certain instances when this procedure may not be very helpful and thus the worker may be forced to file a civil claim in the Industrial Court.



Note:

If the complaint is arising from the contractual agreement or responsibilities then the civil suit should be filed in court within six years but if it arises due to injury or harm-to the worker at the workplace then it should be filed in court with three years of the occurrence.

Workers who are members of a union should present their complaints or grievances to the shop steward who then has the responsibility of trying to settle the matter with the employer. If the shop steward is not able to have the matter settled then he should forward the complaint to the union.

Certificate of Service

Upon termination of employment, every worker who has worked for at least four months consecutively should receive from the employer a certificate of service.

The certificate should contain the following information:

- Name of employer and the postal address;
- Name of worker;
- Usual place of employee;
- Date when employment commenced;
- Job title;
- Date employment ended;
- Any additional specifics as needed.

The employer is not bound to give a worker a testimonial, reference or certificate relating to the character or performance of any worker.



Gratuity

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.

Note:-Gratuity and pension schemes are not one and the same. In the case of pension schemes, both the employer and the worker make 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.



The Industrial Court Act No. 20 of 2011

The Act establishes a revamped Industrial Court that is the same status of the High Court as provided in the Constitution of Kenya. The Industrial Court is established as a court of superior record. The Industrial Court has been moved from the Ministry of Labour to the Judiciary under the authority of the Chief Justice.

It describes the qualifications, remuneration and security of tenure of the judges of the Industrial Court. The Chief Justice has powers to appoint a judge for every county in the interest of access to justice. The Judges of the Industrial Court are meant to be experienced judges, seasoned advocates, magistrates or law academics. They are required to be people of integrity and to uphold the law. The members of the Court must be gender balanced.

Powers of the Industrial Court

The Court is given powers to adjudicate over all cases of employment and labour relations involving employers, employees, employer's organisations and trade unions. All these disputes shall be filed in the independent registry of the Court that is headed by the Registrar. The registry and the Industrial Court are located at **National Social Security House, 3rd Floor, Community Area, Nairobi.**

Procedures in the Industrial Court

There are two parties in any labour dispute namely the **Claimant**, who files the case, and the **Respondent**, who defends the case.

The claimant will institute a claim 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. Any supporting documents must be filed with the claim.

The Respondent will be required to file a reply to the memorandum of claim upon service. The reply to the memorandum of claim must also respond to the grievances and include submissions and orders sought for dismissal of the claim.

Thereafter the disputants are required to take a date for directions before the Judge of the industrial Court. On this date, the Judge shall confirm that all the documents are in order and give directions on whether and where the case should proceed for hearing. The Judge can order that the case proceeds for hearing in another town so long as the Court is able to hold sittings therein. Once a hearing date is taken, the parties shall be allowed to call their witnesses on the date. After oral evidence is taken by the Judge, the parties will give their final submissions. The Judge will then proceed to give the award.

Unlike ordinary courts, an employee and employer need not be represented by advocates. A trade union representative or employer's organisation is allowed to appear before the Industrial Court on behalf of an employee or employer respectively. On the other hand, an employer and employee are at liberty to appear in person or to hire the services of an advocate for representation.

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.

The Industrial Court Rules

The Industrial Court Act establishes an Employment and Labour Relations Rules Committee for purposes of making rules for the Court in consultation

with the Chief Justice. However, since the enactment of this new law, the Chief Justice is yet to revise the current rules to reflect the new developments. At the moment, the Court applies The Industrial Court (Procedure) Rules 2010 which were prepared in consultation with all stakeholders in the labour industry namely Federation of Kenya Employers (FKE) and Central Organisation of Trade Unions (COTU). These rules give direction on how to approach the Industrial Court with respect to:

- Preparing court documents, also known as pleadings.
- Filing of pleadings
- Service of summons
- Procedure at the hearing
- List of court fees to be paid on filing
- Other relevant forms that will be used for filing

The AG has published the **Statute Law (Miscellaneous) Bill 2012**. The Bill is still pending in Parliament and seeks to amend amongst other laws the Industrial Court Act 2011. The one major change is to introduce the use of the Civil Procedure Rules in the execution of the orders of the Industrial Court. The other proposed change is to rename the court to the **Labour Relations Court**.

Conclusion

This booklet tells you what the current Kenyan law says about the rights of workers. However, it does not discuss how people might want the law to change. Please note two concerns:

Many employers do not follow the letter of the law. If this happens, workers should report the failure by their employers to follow the law to the Provincial Labour Office, Social Security House, Nkrumah Road, Mombasa, or any the Local District Labour Officer or the nearest labour officer in his/her area.

Kenya's laws do not recognize some rights found in other countries. If you are not satisfied with the present laws, organize people in your area and talk to trade union representatives. Ministry officials, your Member of Parliament, NGO's and other civil society. Changing a law is a slow process, but it can be done with persistent determination.

Note: At the time of going to print the government had appointed a Task Force to review the current laws. We hope that this would present an opportunity for positive changes to our current laws.