



THE KENYAN WORKER AND THE LAW

**AN INFORMATION BOOKLET ON
LABOUR LAW**



Produced by

Kituo Cha Sheria (Legal Advice Centre)

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Preface

Labour law is one of Kituo Cha Sheria's (hereinafter referred to as "KITUO") core thematic areas in the pursuit of a just and equitable society. Since its inception in 1973, KITUO has received numerous complaints from workers regarding their terms and conditions of employment, unfair and unlawful termination and or summary dismissal and unfair labour practices. KITUO has swiftly responded to these issues with legal aid, advice and representation as well as through policy advocacy and education.

In the year 2007, there was an overhaul of the national legislative framework on labour rights. The law reform 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 achieving a new set of reformed updated labour legislation through a coordinated and 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The following six (6) core labour statutes were comprehensively reviewed and repealed in that process.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.

In the place of the above statutes, the following five (5) new pieces of legislation were enacted:

- 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
- 6) The Employment (Amendment) Act, No. 2 of 2021
- 6) The Employment Act (Amendment), No. 15 of 2022

7) The Employment and Labour Relations Court Act, No. 20 of 2011

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.

Later in 2010, Kenya adopted a new Constitution that included progressive rights provisions even in the labour law sector. Article 41 of the Constitution of Kenya 2010 provided a specific right on labour relations. Further, article 162(2)(a) established a specialized court of the same status as the High Court of Kenya which specifically resolves employment and labour relations disputes i.e. the Employment and Labour Relations Court. As a result of the constitutional reforms, new legislation was adopted i.e. the Employment and Labour Relations Court Act No. 20 of 2011 and an amendment to the Employment Act 2021. The establishment of the Employment and Labour Relations Court has resulted in rich jurisprudence on labour rights in Kenya. As the aforesaid Court marks a decade of existence, it is relatively clear that access to justice in matters relating to labour has been enhanced. We continue to urge for vigilance and strict implementation of labour laws for the benefit of employees, employers, the market and the economy as a whole.

Despite the robust legal and policy framework, we have noted an increase in the number of workers seeking legal assistance. We have found that the ordinary Kenyan worker lacks basic knowledge about his or her rights. Similarly, employers are equally unaware of their obligations towards their workers. Further, the new amendments to the labour law regime were not captured in our previous edition of the booklet. It was hence necessary to update the public and stakeholders on the new provisions. This booklet is designed to provide simplified and yet comprehensive information on labour and labour relations law in Kenya. The target audience includes employees, employers, practitioners as well as the general public. We hope that the increased awareness on labour rights will result in fewer violations and hence a more vibrant and impactful workforce in Kenya.



Dr. Annette Mbogoh
Executive Director



Acknowledgement

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 go to the General Assembly, Board and Secretariat of Kituo Cha Sheria, who have tirelessly supported, protected and promoted the rights of workers throughout Kenya. In addition, special gratitude is extended to our development partner UNDP Amkeni for supporting the publication of this booklet and more importantly the work of Kituo cha Sheria.

Special thanks go to those who researched, wrote, reviewed, edited and made inputs to enrich this booklet. Special gratitude goes to the Advocacy, Governance and Community Partnerships programme staff, Dr. Annette Mbogoh, Executive Director, Larissa Truchan and Kingsley Taabu, volunteers, who all contributed towards the development of this publication.

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Last but not least, we sincerely appreciate the individuals and communities who have approached our organization for legal assistance hence showing confidence in our ability to support them to achieve justice. We would not be here if it were not for you.

Thank you all.



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Glossary

Basic salary - An employee's gross salary excluding allowances and other benefits

Casual employee - A person whose terms of engagement provide for his or her payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time

Child - Any person under eighteen 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 including any visual, hearing, learning or physical incapability, which impacts adversely on a person's social and economic participation.

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: 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.

Lockout - The closure of a place of employment or the suspension of work by an employer for the purpose of compelling the employees



to accept a demand in the case of a trade dispute without terminating the employment.

Permanent Disablement - Permanent injury or disfigurement.

Piece work – Any work whose pay is ascertained by the volume of work performed regardless of the time utilized for its performance.

Probationary contract – A contract of employment which is not longer than twelve (12) months and which is in writing and expressly stated that it is for a probationary period.

Redundancy - The loss of employment, occupation, job or career through no fault of the employee. It typically involves termination of employment by the employer where the services of the employee are unnecessary as a result of downsizing, closing down of office and loss of employment.

Remuneration - Money paid for a work or service.

Strike – The cessation of work by employees due to a collective refusal to continue to work so as to compel their employer or an employers' organization to agree to any demand in a trade dispute

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.

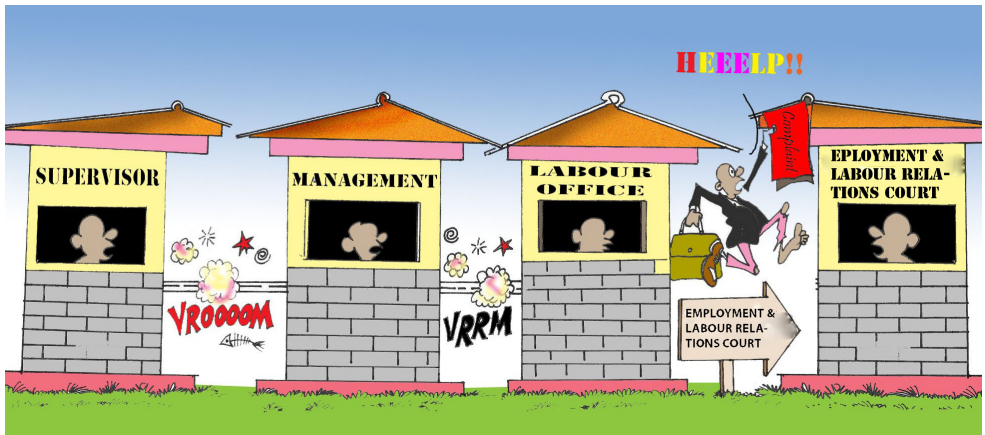
Trade union - An association of employees whose principal purpose is to regulate relations between employees and employers, including an employer's organisation.

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

Worst form of child labour – The employment or use of children and young persons in any activity comprising:-

- (a) All forms of slavery or practices similar to slavery e.g. sale and trafficking of children, debt bondage, forced or compulsory recruitment of children in armed conflict
- (b) Child prostitution and pornography
- (c) Any work which by its nature or circumstances is likely to harm the health, safety or morals of the child

Young person - A child who has attained the age of sixteen years but has not attained the age of eighteen years.





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, we believe that basic education about one's rights is the first step toward protecting one's rights.



International Conventions and Treaties

Kenya, as a member of the International Labour Organization, has ratified 52 important Conventions related to the rights of all workers. The fundamental Conventions ratified 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).
- The right to equal remuneration (Convention No. 105)
- The right to non-discrimination in employment (Convention No. 111)
- Minimum age Convention (No. 138)
- Worst forms of Child Labour Convention (No. 182)

As a signatory to these conventions, the Kenyan government is legally obligated to ensure that these rights are protected and applied in Kenya. However, Kenya has not ratified 49 ILO Conventions. Three of these Conventions are categorized as fundamental. The following fundamental conventions have not been ratified:

- Freedom of Association and Protection of the Right to Organize Convention (No. 87)
- Occupational Safety and Health Convention (No. 155)

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- Promotional Framework for Occupational Safety and Health Convention (no. 187)
 - Protocol to the Forced Labour Convention (No. 29)

National Labour Laws in Kenya

There are seven pieces of legislation 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.” The right to non-discrimination hence means that every person has a right to be treated equally and fairly at the time of recruitment, employment and termination.

More specifically, Art 41 provides for labour relations. It states that every person has the right to fair labour practices i.e. the employer and the employee. 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 for 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 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 employer's organisation; and
- To participate in the activities and programmes of an employer's organisation.

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

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

Article 43 of the Constitution provides for socio-economic rights. Specifically, article 43(1)(e) provides the right to social security. The Constitution places an obligation on the State to provide social security for persons who are unable to support themselves.

Finally, Article 48 of the Constitution provides for access to justice. The State has an obligation to ensure that all persons access justice. If any fee is required to do so, it shall be reasonable and not hinder access to justice. Therefore, any person whose labour rights have been infringed has a corresponding right to access justice for an appropriate remedy.

2. The Employment Act of 2007

The Employment Act establishes the minimum terms and conditions of employment in Kenya. 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 include: contract of service, a prohibition against forced labour, discrimination in employment, sexual harassment, payment of wages, leave, termination and living amenities. Section 2 and 9



of the Act were amended in 2021 and 2022 respectively. On the other hand, a new section 29A was inserted.

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 a 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 Conventions compliant laws on employee compensation in the workplace. Following the enactment of this Act, many of the sections were annulled by the Court having found them unconstitutional. The unconstitutional sections and parts are: 7, 10, 16 and part IV and V. However, following a Gazette notice by the Chief Justice on 28th April 2023, the suits in court that had been stood over generally after provisions of the Act were declared unconstitutional, will conclude to their logical conclusion.

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 environments 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. Employment and Labour Relations Court Act 2014

The Act establishes the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations. The Court is established pursuant to Article 162 (2) of the Constitution of Kenya 2010 and is a superior court of record with the status of the High Court. The operations of the Court are guided by the Employment and Labour Relations Court (Procedure) Rules.

The Court handles all employment cases, but in order to alleviate the backlog of cases, the Chief Justice issued a gazette notice stating that claims involving salaries below eighty thousand Kenyan Shillings can be filed in the Chief Magistrates' Court.

The Employment and Labour Relations Court hears and determines claims relating to unfair dismissal, termination, redundancy, discrimination and disputes arising from trade union membership.

8. The National Social Security Act

Amendment to the NSSF Act

The NSSF act operationalizes the right to social security as enshrined in article 43 of the constitution. It provides for financial security to Kenyans upon retirement. It is a pension fund. Mandatory contributions are made to the fund by the working class Kenyans as every employer and employee is mandated to sign up for the service. However, one can also voluntarily sign up for the service.

The NSSF Act has undergone statutory amendments in 2023 after the suit against NSSF was ruled in its favour at the Court of Appeal. In the preliminary suit, *Kenya Tea Growers Association and 8 Others v The National Social Security Fund Board of Trustees and Others*, Petition No. 38 Of 2014 (Consolidated with Petition 34,35, 49 And 50 Of 2014 lodged in High Court, the Petitioners sued the NSSF Board of Trustees, Cabinet Secretary for Labour, the Retirements Benefits Authority, the Competition Authority and the Attorney General, concerning various aspects of the National Social



Security Fund Act, 2013 (the NSSF Act).


They argued that the mandatory nature of employees to register for the service despite having other better saving alternatives was a violation of articles 24, 26, 28, 27, 36, 41 and 43 of the Constitution. The petitioners had other pension and security schemes and compelling them to register for the service put a strain on them. They further argued that the Act violated articles 110 and 205 of the constitution and should be declared unconstitutional. Their rationale for the argument was that the Act was legislated without involving senate despite the fact that it affected the powers of the County Governments.

The Respondents argued that the Act was integral to the right to social security under article 43 of the constitution and that Parliament was within its jurisdiction. The Retirement Benefits Authority, on the other hand, accepted that sections 18, 19 and 20 had no constitutional justifications to limit citizens on their choice of pension schemes.

The main argument was on the validity of section 20 of the Act limits employers and employees to the NSSF scheme and does not give them free will to register with schemes of their choice. The Courts found that the section was a violation of freedom to choose their preferred retirement benefit scheme.

The Court also found that the Act was contrary to section 3 of the Competition Act. This is because it favored NSSF over other pension schemes. The effect of that is that it crippled the other pension schemes and made it hard to compete with NSSF. The High Court ruled that section 13 of the Act, which provided that the Cabinet Secretary would approve remuneration paid to the board, as unconstitutional. The mandate is under the Salaries and Remuneration Commission. The judgement rendered mandatory contributions to the fund unconstitutional. The Act was thus declared unconstitutional.

In a judgement rendered on 3rd February 2023, the Court of Appeal overturned the decision of the lower court holding that the enactment of the NSSF Act was constitutional and legal guidelines had been adhered to by both the Senate and the National Assembly.



The Court of Appeal focused on the Labour Court's jurisdiction to hear the case but did not address overarching issues such as NSSF through the Act acting as a monopoly in providing retirement benefits thus violating of the right of employees to choose their pension arrangements given the mandatory registration and contribution to NSSF. The County Pensioners Association appealed to the Supreme Court against the Court of Appeal decision. We are not aware of any orders staying implementation of the 2013 Act at the publishing of this booklet.

In light of the Court of Appeal decision, the 2023 NSSF Act Regulations were enacted to provide for NSSF monthly contributions to be paid 12% pensionable earnings split in half with 6% coming from the employee and 6% coming from the employer. The remittance of the contributions are still mandatory with different Tiers required to remit different amounts.

9. The National Health Insurance Fund Act



The provisions of the amendment Act came into force on the 28th January 2022. The Act is one of the government's strategies to ensure universal health coverage. Universal Health Coverage is one of the previous administration's pillars of the Big- 4 agenda. The amendment was essential for its realization of this pillar for service delivery to the citizens.

There are several amendments which were made to the Principal Act to ensure the attainment of the agenda. They include:

(i) Introduction to the term “Beneficiaries”

The NHIF amendment act 2023 introduces the term beneficiaries. It refers to:

- A person who has not attained the age of 21 years, has no income and is living with the contributor;
- A person who has not attained the age of 25 years, is undergoing a full time course of education at university, college, school or other educational establishment or serving



under articles or an indenture with a view of qualifying in a trade or profession and is not in receipt of any scholarship, bursary or similar grant or award;

- A person with disability and is wholly dependent on and living with the contributor;
- Is a spouse;
- Is a contributor.

(ii) Amendment from ‘Hospital’ to ‘Health’

Section 3 of the amendment act provides for the deletion and substitution of the term hospital with ‘health.’ It was therefore changed to the National Health Insurance Fund. This is important as it now gives beneficiaries of the fund to access healthcare services from institutions other than hospitals. That may include institutions such as hospices and consultants.

(iii) Registration for the Fund


The amendment under section 15 provides for the registration of the fund. Persons who have attained the age of 18 years and are not beneficiaries of the fund shall register as members. This is in bid to increase the coverage of health insurance for everyone in the country.

As of 5 months ago, membership consisted of 14.3 million principal members, and 18.6 dependents, totaling 32.9 million beneficiaries. Kenya had a total population of 47 million at the time of the statistic. Therefore, approximately 15 million Kenyans were not beneficiaries of the fund. The government has provided for mandatory registration as a way of increasing the number of Kenyans covered by the fund.

(iv) Matching Contributions

The amendment to section 15 of the act provides for the National and County governments as matching contributors to employees. The National government is also a contributor to indigent and vulnerable persons contributing Kshs. 13,300.

Under the old contribution system, salaried workers were contributing



between Sh150 and Sh1,700 depending on their monthly pay while those in the formal sector were paying a flat rate of Sh500. A salaried person is now required to contribute a standard rate of 2.75 percent of the gross monthly salary towards the NHIF cover. A self-employed person will be expected to make a special contribution of 2.75 percent of the declared or assessed gross monthly income, subject to a minimum of Sh.300.

Private employers, are of course, also required to match contributions. However, there is an exception in instances where an employer has provided a private medical cover for their employees. They are not required to pay for NHIF. However, they are obligated to submit an application with a certificate from the insurance company to the NHIF board. That application would be for an exemption from matching contributions.

(v) Private Insurance Health Covers

There is an amendment to section 22 of the Principal Act with regards to private insurance health covers. The NHIF cover will only pay for the medical bill when the private insurance cover has been exhausted. Therefore, there is a limitation on its use to persons with private insurance health covers.

(vi) Penalties and Fines

Section 16 of the Amendment Act provides for fines to employers who fail to pay standard or matching contributions for employers to the fund without any lawful excuse. The fines have been amended to 500,000 from 50,000.

There are also penalties for late payment for standard and matching contributions. The penalty, according to section 18 of the act, is a percentage equal to the lending rate of interest of the amount of the contribution.

The importance of these penalties is to ensure compliance of the provisions of the act.



Types of Workers:

Workers may be classified into three main categories. **Any worker of three months or longer should have his or her contract in writing.**

1. Permanent worker

A permanent worker is a person who signs a written employment contract that identifies him or her as being “permanent”. It also includes a person who does not have a written contract but who is paid at the end of thirty days.

A permanent worker is expected to work for a probation period, generally from one to three months, before he or she is confirmed and can claim benefits. In the event of resignation, the worker is expected to give at least one month’s notice or one month’s salary in lieu of notice.

In the event of termination, the permanent worker 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

A 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.

She/he 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 worker

It 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 bargaining agreement. The employer and employee relationship is tied to the period of the contract.

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 and provided by law.

Every worker hired for a period 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 worker's 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.

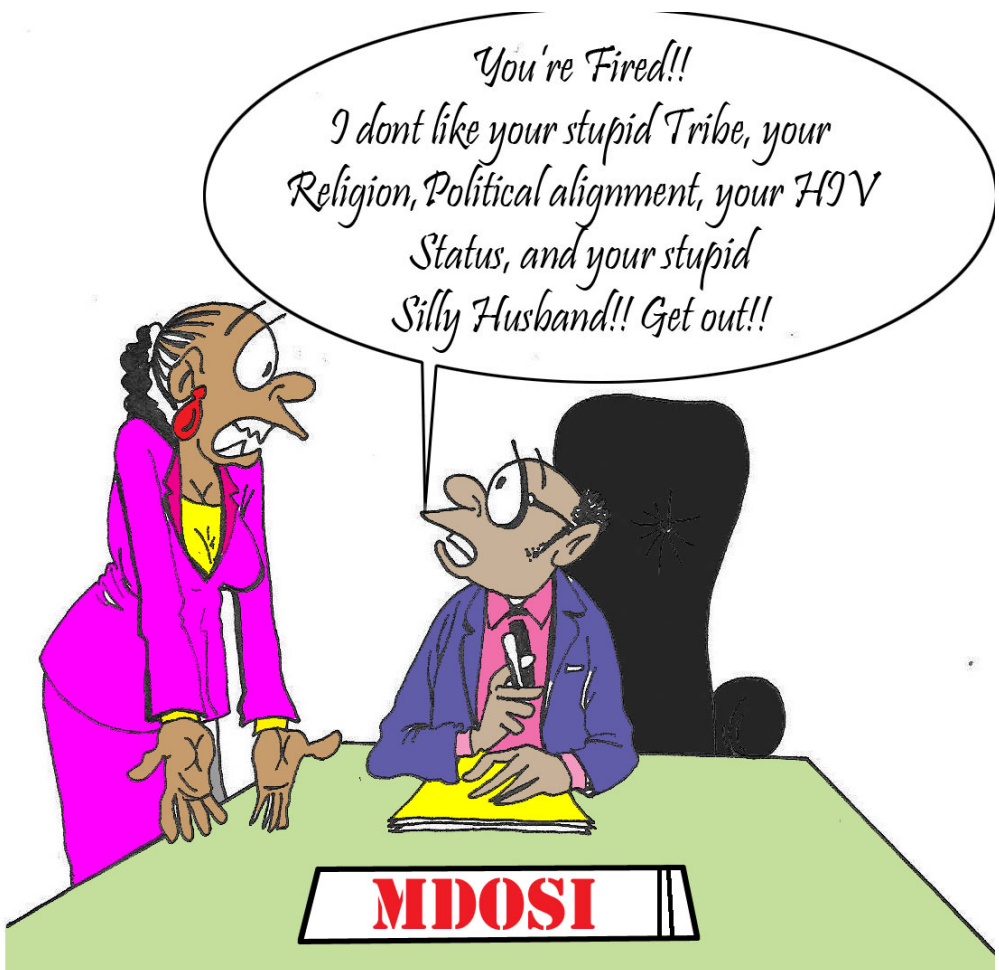
Legal Duties of every Worker

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.





Compliance and Clearance Certificates

Section 9 of the Employment Act 2007 was amended to remove the requirement of an employee to submit any clearance or compliance certificate at the point of recruitment. Clearance or compliance certificates can only be provided when an employee is entering into employment. An exception is extended to applicants seeking state offices.

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 implies or expresses promise of special or detrimental treatment in the workplace, or threatens the future working status of an employee;
- Uses either written or spoken sexual language;
- Uses visual material of a sexual nature;
- Jeopardizes 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 20 or more employees reside in a single work place, the employer must consult with employees and or their representatives 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 employee's 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:

- Piece work 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.

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 the worker 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 or her and the worker's contribution. If an employer fails to make these payments, he or she 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 or 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 or her employees. Thus, all employees, whether paid weekly wages, a monthly



salary, annual salary, bonus, etc., must pay this tax. For example, in the year 2023, any permanent worker whose gross pay exceeded Kshs. 24,000, was 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 or her up to date payments. The employer retains this card and should remit all contributions to the fund promptly every month.

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, herdsmen 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 or 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 or she was summarily dismissed.

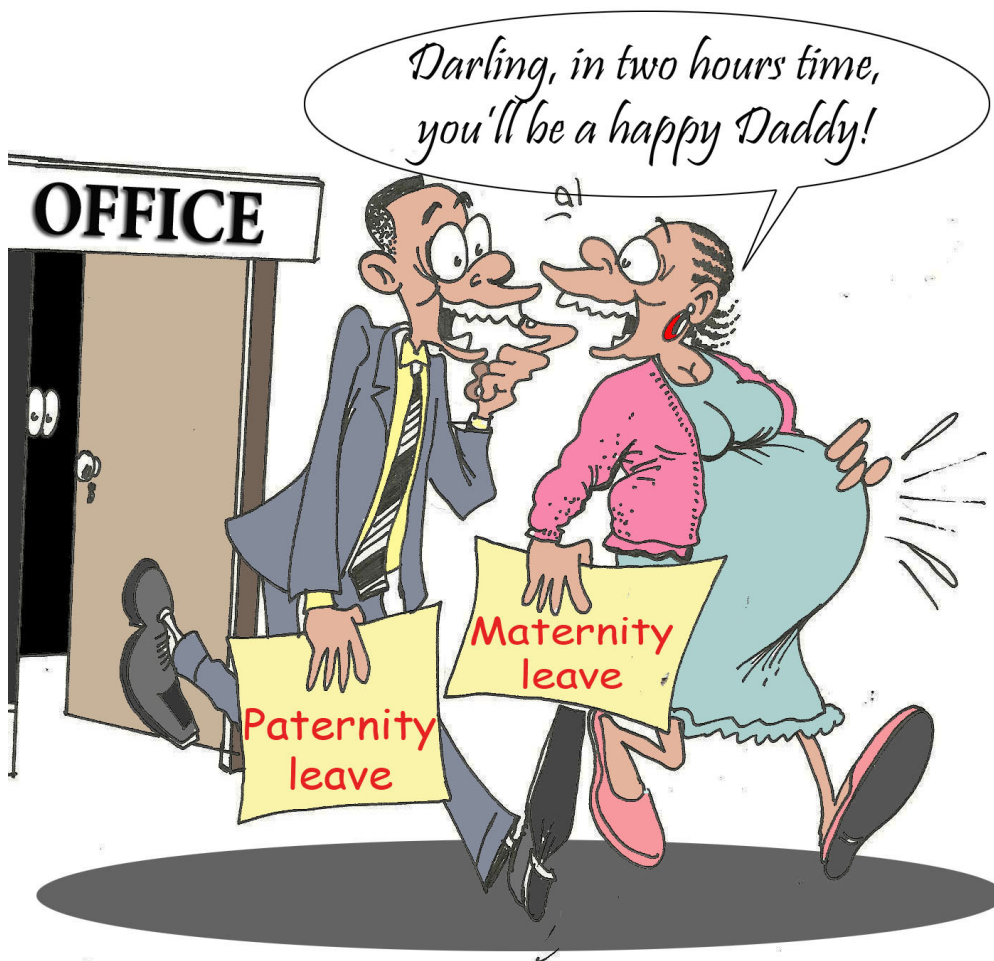
Public holidays and sick leave days are not counted as leave days. Public holidays with full pay are: New Year's Day, Good Friday, Easter Monday, Labour Day, Madaraka Day, Idd-ul-Fitr, Mashujaa Day, Jamhuri Day, Christmas Day, Boxing Day and any gazetted public holidays.



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 or her employer of the illness.

Once an employer is informed of a worker's illness, the employer must provide him or 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 to 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 or 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 to 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 job during that period.

Male employers also have the right to two weeks paternity leave with full pay. Maternity and paternity leaves are also extended to adoptive parents.

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 workplace;
- 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 or her own safety and health 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.

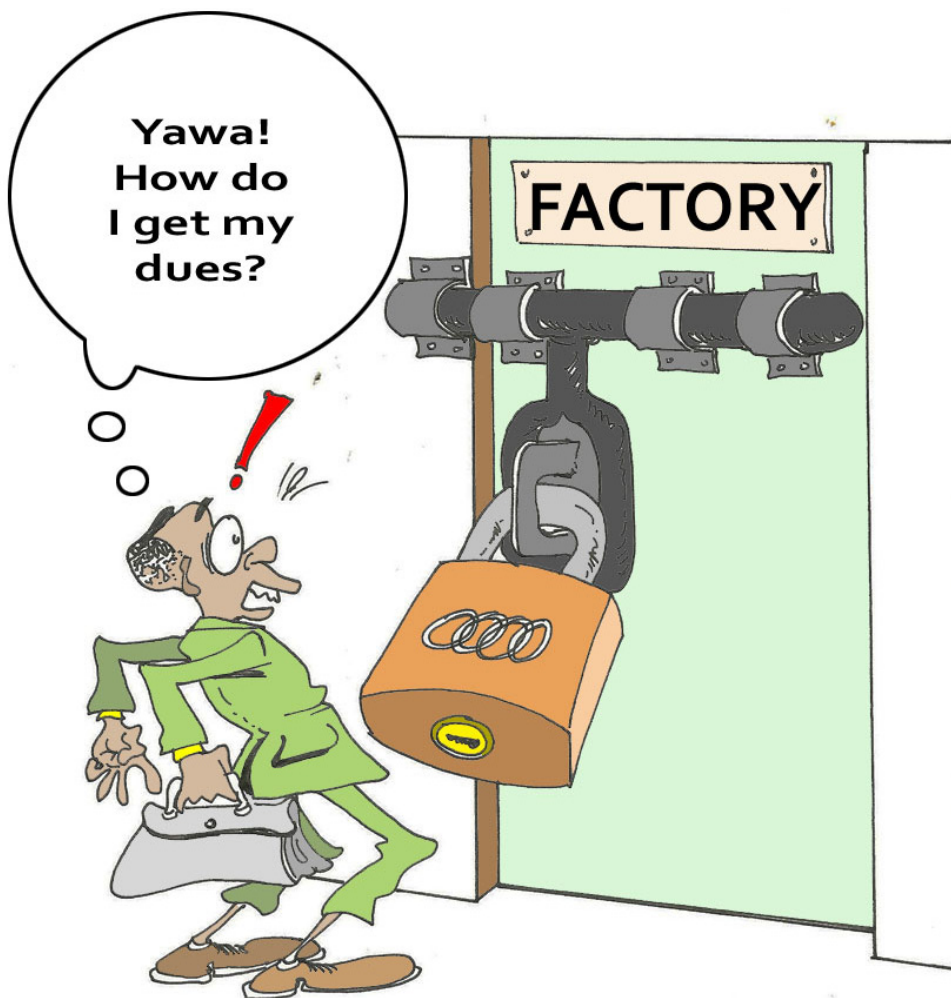
Any employer or worker who does not take reasonable care in handling poisonous substances or machinery, and thus endangers others, is guilty of a criminal offence.





Compensation for Injury or Illness

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 Work Injury Benefits Act.

It is important to note that a worker may make a claim for compensation





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

Seeing as the Work Injury and Benefits Act was declared unconstitutional, all claims with respect to compensation for work related injuries and diseases shall be heard before the Director of Occupational Safety and Health Services. All appeals arising from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court. Those appeals shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.

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 workplace;
- Knowingly failing to obey a lawful and proper command that is within the scope of employment otherwise referred to as



insubordination;

- Arrest for a crime punishable by imprisonment, and not released within 14 days;
- Committing a criminal offense against the employer of 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 of 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, 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.

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 or she should forward the complaint to the union.

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

Employment and Labour Relations Court.

Note: If the complaint is arising from the contract of services i.e. unfair termination or wrongful dismissal then the civil suit should be filed in court within three years. There is no option for an extension of time. If the complaint arises due to injury or harm to the worker at the workplace, it should be filed in court within three years of the occurrence.

Certificate of Service

Upon termination of employment, every worker is entitled to receive a certificate of service from the employer.

The certificate should contain the following information:



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

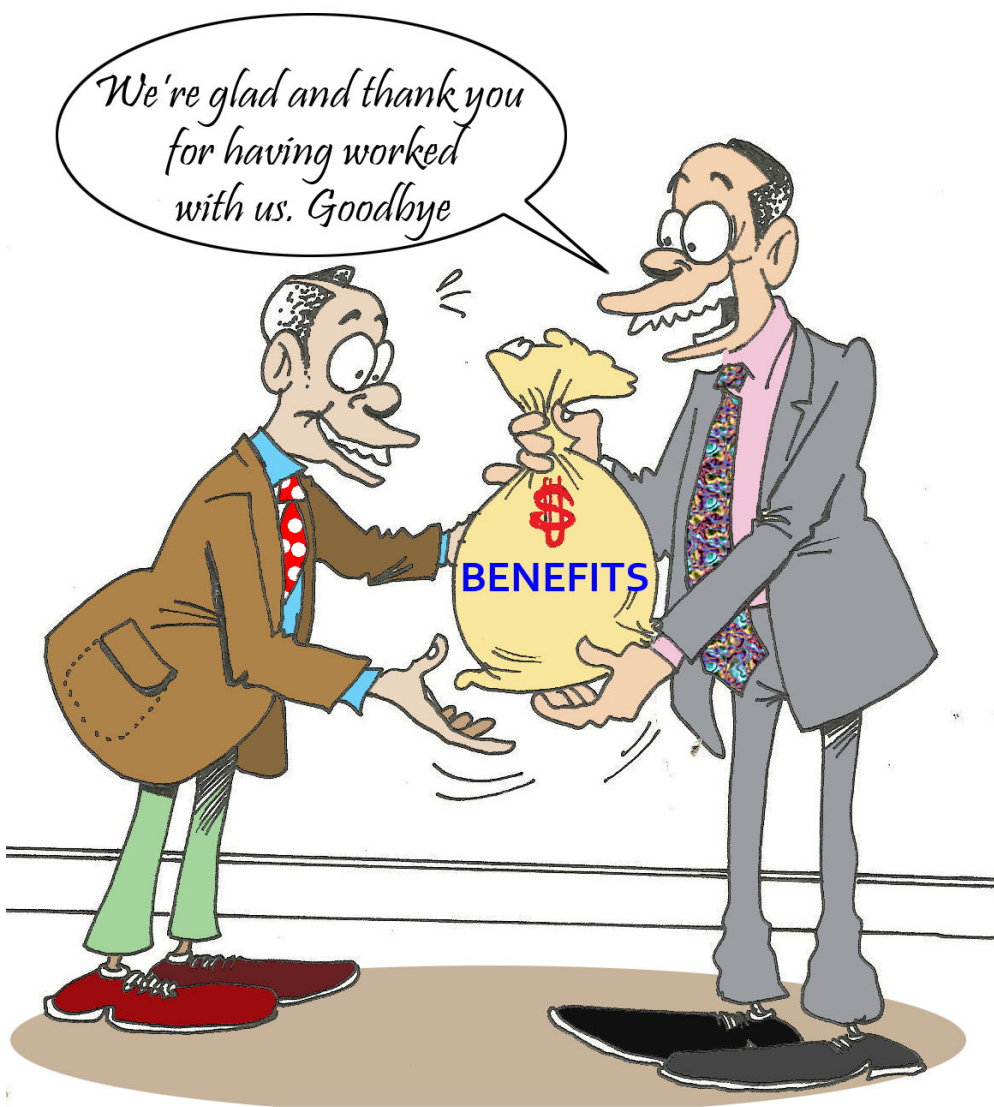
The employer is not bound to give a worker a testimonial, reference or certificate relating to the character or performance of any worker.

Gratuity

A gratuity is a terminal benefit like a provident fund or pension scheme that is intended to help a worker after termination due to retirement, resignation or in the event of death or disablement. 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 Employment and Labour Relations Court Act

The Act establishes a revamped Court that is the same status as the High Court as provided in the Constitution of Kenya. The Employment and Labour Relations Court (ELRC) is established as a court of superior record.



Initially, the Court was named the Industrial Court and it was anchored under the Ministry of Labour. Under the new dispensation, the Court has since been moved to the Judiciary under the authority of the Chief Justice as a specialized court.

The Act describes the qualifications, remuneration and security of tenure of the judges of the ELRC. The Chief Justice has powers to appoint a judge for every county in the interest of access to justice. The Judges of the ELRC 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 Employment and Labour Relations 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 ELRC are now located at Nairobi in **Milimani Courts, Community Area, Nairobi**, *Bima Towers in Mombasa, Malindi Law Courts, Kisumu Law Courts and Nyeri Law Courts*.

Procedures in the Employment and Labour Relations 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 Employment and Labour Relations Court by filing a **statement of claim** or **memorandum of claim**. The statement/memorandum 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 ELRC. The statement/memorandum 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 ELRC. 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 will also seek to confirm that the parties had sought to resolve the matter out of court. 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 ELRC 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 ELRC can make awards for damages, compensation at a maximum of 12 months' salary, orders of declaration, reinstatement of an employee, and injunctions among others. If a person is aggrieved by the decision of the Court, a right of appeal lies in the Court of Appeal and the Supreme Court thereafter.

The Employment and Labour Relations Rules

The Employment and Labour Relations Court Act established an Employment and Labour Relations Rules Committee for the purposes of making rules for the Court in consultation with the Chief Justice. From this came the Employment and Labour Relations Court (Procedure) Rules, 2016. These rules give direction on how to approach the Court with respect to:

- Preparing court documents, also known as pleadings;
- Filing of pleadings;

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- 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 ELRC adopts the Civil Procedure Rules in the execution of its orders.

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 nearest Labour Office in his or her area. Workers can also report disputes to Kituo cha Sheria Offices in Nairobi, Headquarters and Mombasa Regional Office.

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, NGOs and other civil society organizations. Changing a law is a slow process, but it can be done with persistent determination.



NOTES