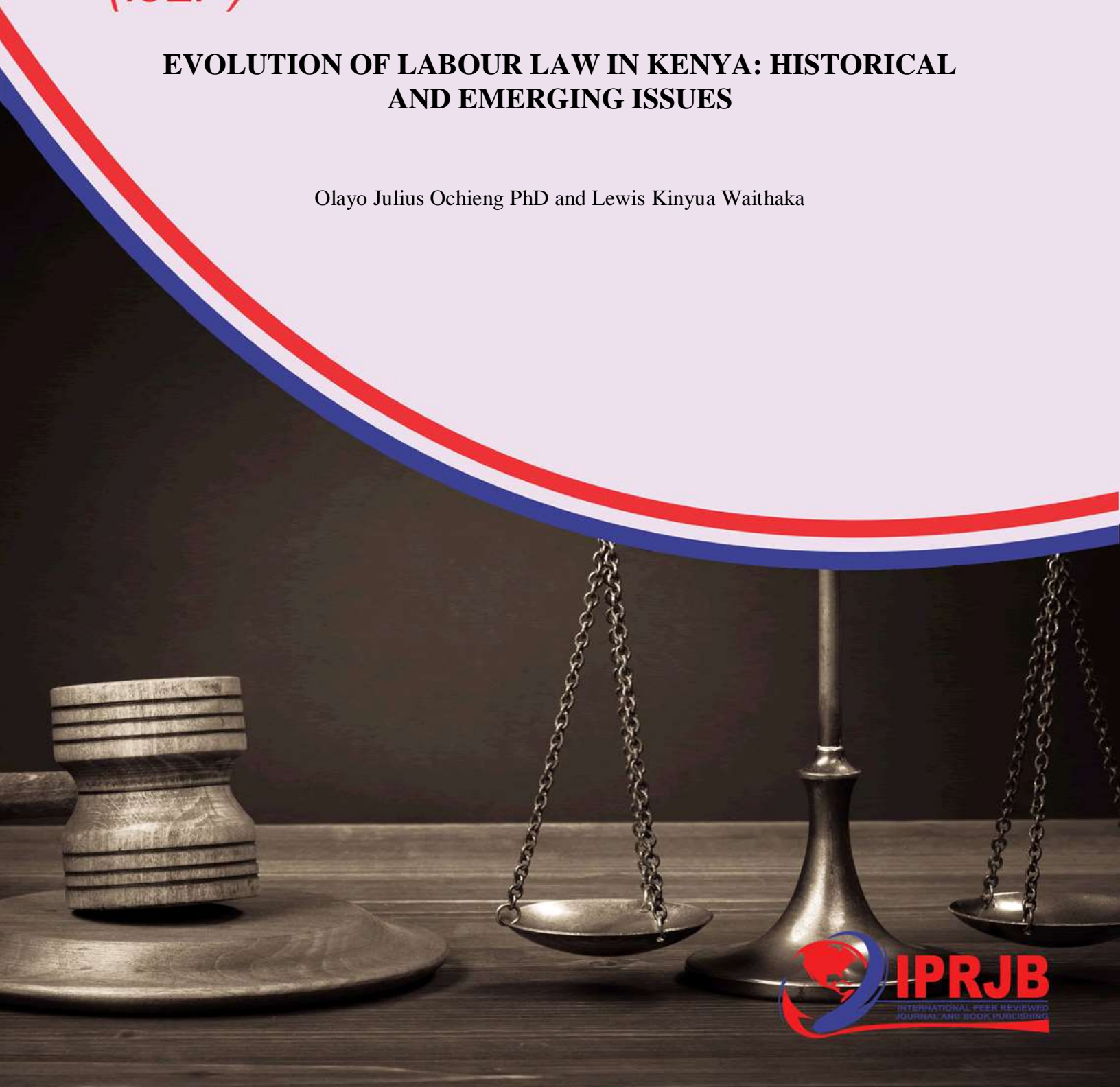


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EVOLUTION OF LABOUR LAW IN KENYA: HISTORICAL AND EMERGING ISSUES

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Abstract

Purpose: This paper sought to evaluate the evolution of labour law in Kenya focusing on the historical and emerging issues.

Methodology: The study adopted desk based methodology. Specifically, the paper identified documentary evidence in the form of already completed studies that focused on evolution of labour law and the emerging issues. This paper is divided into two parts. The first part looked at the historical evolution of labour laws in Kenya. It then proceeded to critically analyze how the historical progress has failed to inform us on dynamics such as globalization, poverty, unemployment and underemployment, and technological advancement facing the labour market. Due regard was given to these factors in relation to social-economic rights, human rights and the accepted international labour standards. The second part discussed three contemporary issues facing the labour market. Emphasis was placed on the industrial strikes, unemployment, and retrenchment and outsourcing. Additionally, the paper evaluated how labour institutions such as National labour board, Committee of Inquiry and employment agencies have underperformed in their duties, and recommended how they can be more proactive. Finally, the paper concluded by underscoring the importance of labour in a global world in promoting social-economic rights.

Findings: The paper concluded that the contemporary issues have reshaped our thinking of the laws, the issues include rise in industrial strikes, employment and retrenchment. The world having turned into a global village, labour forms a key component that needs to be protected by the laws. Ensuring social-economic rights are realized shall promote sustainable human development, equity and dignity.

Unique Contribution to Theory, Practice and Policy: The Employment and labour relations court has been faced with a bulk of cases. It is high time the National labour Board advise the minister on the importance of adopting alternative dispute resolution mechanism to resolve labour disputes. This mechanism will complement the court on its work.

Key Words: *Evolution, Labour Law, International Labour Organization*

HISTORICAL DEVELOPMENT OF LABOUR LAW IN KENYA

The history of labour laws in Kenya can be categorized in three stages as from 1895. They are; the colonial period, International Labour Organization establishment and the world wars and the Post-Independence, and the enactment of new labour laws in 2007 and Post-2010 constitution period.

Colonialization

East Africa became a British protectorate in 1895 and thus the history of labour can be traced from this period.¹The first legislation on labour in east Africa was the Master and servant legislation.² It was introduced in 1906 in Kenya and was of influence until 1950s.³ The most important aspect of this law was that breach of it by the employer resulted into a civil suit, but breach by the employee resulted into a criminal suit.⁴ It suffice to say also that this law was not applicable to England far way before 1895. It was introduced to regulated Africa labour that the British needed for their plantations.

Therefore, the history of labour law in Kenya can be traced back to the colonial period.⁵The period between 1895-1930 has been termed as the setting ground of the modern economy of modern Kenya.⁶ The rise of industrialization in the kingdom prompted the need for raw materials and food, in which Africa and Asia colonies were the best sources.⁷ These colonies also provided for the market of the finished products though in a much lesser percentage.⁸ In order to maintain a steady flow of raw materials and food, the colonial administration had to put in place regulations for the labour industry. The end of world war one formed a vital shift on the nature of labour laws in the world. Colonial powers such as Britain and France had suffered greatly from the war, and hence they had to find a way of recovering.⁹ The only available opportunity was to ensure maximum exploitation of their colonies to cover the loss experienced.¹⁰

International Labour Organization Establishment(ILO), The world Wars and The Post-Independence Period

¹Master and Servant in Colonial Kenya Author (s): David M . Anderson Published by : Cambridge University Press
Stable URL : <https://www.jstor.org/stable/183477> (2019) 41 459.

²ibid.

³ibid.

⁴ibid.

⁵Kivutha K(2003), *Fundamental Rights and Freedoms in Kenya, Nairobi.*

⁶Economic History Association Economic Aspects of British Colonialism in Kenya , 1895 to 1930 Author (s): Richard D . Wolff Source : The Journal of Economic History , Vol . 30 , No . 1 , The Tasks of Economic History
Published by : Cambridge University P' (2019) 30 273.

⁷ibid.

⁸ibid.

⁹Gideon Were Publications, 'Gideon Were Publications THE STRIKE MOVEMENT IN COLONIAL KENYA : THE ERA OF THE GENERAL STRIKES Author (s): Tiyanbe Zeleza Source : Transafrican Journal of History , Vol . 22 (1993), Pp . 1-23
Published by : Gideon Were Publications Stable URL : [https](https://www.gideonwere.com)' (2019) 22 1.

¹⁰ibid.

International Labour Organization Establishment was established in 1919 as part of the Paris Peace Treaty after the end of world war one.¹¹ Its main purpose was to set labour standards. The organization played a major role in liberating Africa from colonial masters. After world war two, it shifted its agenda to supporting and promoting social and economic welfare¹² of undeveloped world.¹³

In 1944, the organization held a conference in Philadelphia, in the United States of America. There was a declaration that was supported by the United States and Great Britain, in that they will align their labour laws to conform to the standards set by the organization.¹⁴ It is in this declaration of Philadelphia that concerns on social issues in colonies were raised.¹⁵ The conference thus saw the adoption of the Social Policy in Dependent Territories adopted.¹⁶ Colony masters were to conform the labour laws in their respective colonies to give effect to the social objectives of the people.¹⁷

The conference had two important effects in international level. Firstly, it made it clear that economic state of poor countries was an international affair, and secondly the Social Policy in Dependent Territories changed the thinking of the colonial master.¹⁸

In 1946, the colonial government in Nairobi enacted The Protective Labour code. This followed the pressure from the British parliament that put restrictions on financial support to colonies until they conform to the standards.¹⁹ The code aimed at reforming how the settlers treated African workers and the relationship between employer and employee. The declaration of Philadelphia set a new approach to social-economic development in Africa.²⁰ This is because the argument was that there can never be true development if there are no certain standards in the labour

¹¹“ Help Them Move the ILO Way ”: The International Labor Organization and the Modernization Discourse in the Era of Decolonization and the Cold War Author (s): DANIEL MAUL Source : Diplomatic History , Vol . 33 , No . 3 , SPECIAL FORUM : MODERNIZATION AS’ (2019) 33 387.

¹²Jeremy Seekings, ‘ILO Century Project The ILO and Social Protection in the Global South , 1919-2005’.

¹³“ Help Them Move the ILO Way ”: The International Labor Organization and the Modernization Discourse in the Era of Decolonization and the Cold War Author (s): DANIEL MAUL Source : Diplomatic History , Vol . 33 , No . 3 , SPECIAL FORUM : MODERNIZATION AS’ (n 11).

¹⁴ibid.

¹⁵ibid.

¹⁶ibid.

¹⁷ILO, Recommendation on Minimum Standards of Social Policy in Dependent Territories (Montreal,1944).

¹⁸“ Help Them Move the ILO Way ”: The International Labor Organization and the Modernization Discourse in the Era of Decolonization and the Cold War Author (s): DANIEL MAUL Source : Diplomatic History , Vol . 33 , No . 3 , SPECIAL FORUM : MODERNIZATION AS’ (n 11).

¹⁹PA Clayton, A Clayton and DC Savage, *Government and Labour in Kenya, 1895-1963* (Cass 1975).

²⁰“ Help Them Move the ILO Way ”: The International Labor Organization and the Modernization Discourse in the Era of Decolonization and the Cold War Author (s): DANIEL MAUL Source : Diplomatic History , Vol . 33 , No . 3 , SPECIAL FORUM : MODERNIZATION AS’ (n 11).

market.²¹ These standards were based on the human rights principles such as freedom of association, freedom from slavery and discrimination among others.²²

The right to freedom of association was an important aspect in the development of labour laws. It created a platform in which the workers were able to articulate their desires and interests to the government and the employers.²³ Hence, these rights coupled with the demands in the Declaration of Philadelphia on social-economic rights and colonial reform document, was used by trade unionist and nationalists to question the legitimacy of the colonial powers.²⁴ Trade unionist leaders such as Makham Singh were the first to demand political independence in Kenya. This period also saw the rise of Tom Mboya who was also a trade unionist leader. He advocated for the rights of the workers even after independence.

In October 1962, there was the establishment of the Industrial Relations Charter between the Kenya government and the Federation of Kenya Employers and the Kenya Federation of Labour, now known as Central Organization of Trade Union.²⁵ This tripartite arrangement committed the parties to consultation, collective bargaining and peaceful dispute settlement.²⁶ The charter laid down the duties of management and unions in relation to industrial concerns.²⁷ It provided a platform of dialogue in case of conflict.²⁸ The later establishment of the Industrial Court²⁹ in 1964 was termed as an important cornerstone in promoting smooth conflict resolution of labour issues.³⁰ This charter has regulated labour relations in Kenya with respect to the legislation until 2007, when new labour laws were enacted by parliament.

Enactment of New Labour Laws in 2007 And Post-2010 Constitution Period.

In 2001, the Attorney General formed a taskforce that operated within the International Labour Organization project to review and give recommendations on the then labour laws in Kenya.³¹ The reforms led to enactment of five labour laws that have transformed the working

²¹ibid.

²²ibid.

²³Editorial Comment : The ILO Convention on Freedom of Association and Its Future in the United States Author (s): Steve Charnovitz Source : The American Journal of International Law , Vol . 102 , No . 1 (Jan . , 2008) , Pp . 90-107 Published by : Cambrid' (2019) 102 90.

²⁴" Help Them Move the ILO Way ": The International Labor Organization and the Modernization Discourse in the Era of Decolonization and the Cold War Author (s): DANIEL MAUL Source : Diplomatic History , Vol . 33 , No . 3 , SPECIAL FORUM : MODERNIZATION AS' (n 11).

²⁵Paul Chepkuto, II Stanley Kipsang and III Maurine Chemirmir, 'Labour Laws and Regulatory Practices in Kenya : An Analysis of Trends and Dynamics' (2015) 2 2014.

²⁶Ruth Tubey, Kipkemboi Jacob Rotich and Margaret Bundotich, 'An Overview of Industrial Relations in Kenya' (2015) 5 221.

²⁷Chepkuto, Kipsang and Chemirmir (n 25).

²⁸ibid.

²⁹Under Article 162 of The 2010 Constitution it is Referred as Employment and Labour Relations Court. Through the Employment and Labour Relations Court Act, the Court Hears and Determine Disputes Relating to Employment and Labour Relations and for Connected purposes.

³⁰Aluchio, L, (2005), *Trade Unions in Kenya, Development [5]. and the System of Industrial Relations, Nairobi.*

³¹Kenya Gazette Notice No. 3204 of 2001.

environment, working relations and remunerations; they include the Employment Act,³² Labour Institutions Act,³³ Labour Relations Act,³⁴ Occupational Safety and Health Act³⁵ and Work Injury Benefits Act³⁶. The objective was to ensure conformity of the laws with the new Labour standards and the changing global working trends.

The 2010 constitution further set the guiding principle in labour law relations.³⁷ Enshrined under the Chapter four which contains the Bill of rights, labour laws have been given a human rights approach. Also social-economic rights advocated since 1945 by the International labour Organization and the Declaration of Philadelphia has been anchored in the constitution. Thus all the labour laws should conform to this guiding principle.

Historical Development Response to the Issues That Have Faced the Labour Market in Kenya

Since the Declaration of Philadelphia in 1944, the international community was brought to attention that labour is not a commodity and therefore cannot be traded and negotiated as a commodity.³⁸ Labour in essences touches to the core aspects of our daily lives.³⁹ It is in this regard that a worker should be treated in a dignified manner. This can be achieved by promoting social economic rights, viewing labour rights as human rights and finally by ensuring that international labour standards are adhered to.

In as much as Kenya is a signatory to International Labour Organization, there are still major problems facing the labour market in the country. These issues range from globalization, poverty, unemployment and under employment and technology advancement.

Globalization

It has been termed as new way of opening the local market to the rest of the world.⁴⁰ Labour, as an important factor of production, has been greatly affected by globalization. The shift on the ease of movement of factors of production⁴¹ has come with its effect on developing economies such as Kenya. It has been argued that the best way to access the success of globalization is through looking at its effects on economic development and poverty eradication.⁴²

³²No. 11 of 2007.

³³No. 12 of 2007.

³⁴No. 14 of 2007.

³⁵No.15 of 2007.

³⁶No.13 of 2007.

³⁷Constitution of Kenya 2010. National Council for Law Reporting (Nairobi, Kenya),Article 41.

³⁸<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm>.

³⁹ibid.

⁴⁰Indian Political Science Association GLOBALIZATION : ITS IMPACT ON LABOUR Author (s): Priti Garg Source : The Indian Journal of Political Science , Vol . 66 , No . 4 (Oct . -Dec . , 2005) , Pp . 813-830 Published by : Indian Political Science Associatio' (2019) 66 813.

⁴¹ibid.

⁴²Source Africa and Development Afrique, 'Maladjusted African Economies and Globalisation Author (s): Thandika Mkandawire Stable URL : <https://www.jstor.org/stable/24484599>' (2019) 30 1.

Globalization has opened unfavorable competition between domestic players with international investors.⁴³ The impact of this can be seen in two aspects. Firstly, opening domestic market to the world has disempowered labour⁴⁴ market in Kenya. This can be seen from the new concepts that globalization has brought in, such as part-time work, casual employment, agency work among others.⁴⁵ The local political systems that protected its local labour has been influenced by international politics thus influencing negatively labour standards and wages.⁴⁶

Secondly, as much as globalization is one way of empowering the people, it nevertheless threatens to widen the gap between the rich and the poor in the developing world.⁴⁷ The trading plane between the developed world and developing ones is not favourable. This is because there are very few products and services that are imported from the developing world.⁴⁸

This disparity has in turn led to increase in poverty and unemployment thus frustrating the realization of social-economic rights. More people are finding themselves unable to afford to pay for health services, clean water, good housing in the name of globalization.

Poverty

This is another aspect that has contributed negatively to the economic development thus affecting the labour market. It is poverty that has led to poor working conditions in Kenya according to IMF-World bank reports.⁴⁹ This has been supported by the government data that majority of working people are living on or below the government poverty line.⁵⁰ Poverty has therefore affected the realization of social protection securities. The workers and their families are not able to be covered by social programs that would cater for their health, housing, food among other needs.

Poverty has also opened up to violation of human rights. The requirement for fair labour practices demands fair remuneration and favourable working conditions.⁵¹ Most Kenyans are willing to work for even a dollar a day because of poverty. Another factor related to poverty is the HIV/AIDS pandemic that has been found to affect mostly, in a harsh way, the poor in the society.⁵² The little the working affected persons get from working are used in treatment and care to the sick.⁵³ Cases of discrimination based on being HIV positive have been reported even after the promulgation of the 2010 constitution.

⁴³Indian Political Science Association GLOBALIZATION : ITS IMPACT ON LABOUR Author (s): Priti Garg Source : The Indian Journal of Political Science , Vol . 66 , No . 4 (Oct . -Dec . , 2005), Pp . 813-830 Published by : Indian Political Science Associatio' (n 40).

⁴⁴ibid.

⁴⁵ibid.

⁴⁶ibid.

⁴⁷Damiano Kulundu Manda, 'Globalisation and the Labour Market in Kenya DISCUSSION PAPER 6'.

⁴⁸ibid.

⁴⁹'An Employment Targeted Economic Program for Kenya.' (2009) I.

⁵⁰ibid.

⁵¹Constitution of Kenya 2010. National Council for Law Reporting Article 41(n 36).

⁵²Source Transformation, Christian Faith and Economics Revisited, 'Reducing HIV / AIDS' (2019) 17 142.

⁵³ibid.

Unemployment and under employment

The number of job seekers entering the labour market is approximately a million yearly.⁵⁴ Majority of these lot end up joining the informal sector that is not well regulated to protect them.⁵⁵ This sector is prone to exploitation and poor working conditions that have threaten the basic human right of fair labour practice.⁵⁶ The major reason as to why majority are joining the informal sector in developing countries is lack of adequate capital to venture into formal sector.⁵⁷ However, policy developers have identified manufacturing sector as one of the key sectors that would create employment.⁵⁸ The government of Kenya through its four agenda program has identified this sector.

Technology advancement

It has been brought in by globalization has been said to be an important factor of production in the modern world. New production methods used have greatly reduced the man power needed in developing countries which are experiencing high population growth.⁵⁹ The technology used is mostly invented in developed states. Information communication technology and the manufacturing sector have the potential of creating opportunities if utilized well.⁶⁰

CONTEMPORARY ISSUES FACING LABOUR MARKET IN KENYA

All is not well in the industrial relation in Kenya. The rise in industrial strikes in the last three years from different trade unions is a clear indication that much has to be done. The jailing of Kenya Medical Practitioners and Dentist Union leaders by the court challenges the lawyers to re-look at the role of labour institutions in addressing the plights of employees much earlier, so that provision of crucial services cannot be affected by industrial strikes. This section will identify three problems facing the labour market that the labour institutions need to address.

Rise in Industrial Strikes

The constitution provides that every worker has a right to go on strike.⁶¹ The recent rise in exercise of this right by various categories of workers are attributable to demand for pay increase and good working conditions. On February 2019, Kenya National Union of Nurses gave a strike notice through its national advisory council. One of its demands was that the Collective Bargain Agreement be implemented as it would have seen the nurses receive their allowances. The county government staff through their union, Kenya County Government Workers Union,

⁵⁴LOFTF Council and Analytical Unit, 'Kenya'.

⁵⁵International Labour Conference, International Labour and Office Geneva, *Decent Work and the Informal Economy* (2002).

⁵⁶ibid.

⁵⁷ibid.

⁵⁸Collaborating Organizations: National Council for Population and Development (n 54).

⁵⁹Council and Unit (n 55).

⁶⁰Collaborating Organizations: National Council for Population and Development (n 54).

⁶¹Constitution of Kenya 2010. National Council for Law Reporting (Nairobi, Kenya) Article 41(2)d.

embarked on a go-slow demanding the July 2019 pay.⁶² The only deduction that can be made from such rise in industrial strikes is existence of poor resolution mechanisms.⁶³

In march 2018, Kenya University Staff Union was sued for engaging in a strike that was in contravention of section 76 and 78(1)(e) of Labour Relations Act. Justice Onesmus Makua noted that the trade dispute was as a result of refusal by the management to negotiate, conclude and implement the 2017-2021 CBA.⁶⁴ The government had argued that it failed to present a counter-proposal due to the repeat presidential election in 2007 that affected government budgeting, in which the court took judicial notice.⁶⁵ The court thus directed the parties to the cabinet secretary of labour to assist in conciliation within sixty days.⁶⁶

The recent increased of strikes have also made Kenyans through public interest litigation, approach the court to determine the question as to whether section 81 of the Labour Relations Act⁶⁷ is a necessary limitation to the right to strike in respect to essential services such as health.⁶⁸ The court was quick to defend this right and state that the Act has well governed and provided for essential services.⁶⁹ The even guided by the International Labour Organization principles on the right to strike, in which compensatory guarantees of employees denied this right are secured.⁷⁰ The step of approach the court on such an issue shows the devastating effects the strike has resulted to Kenyans.

Employment

Employment has been a global issue especially among the youth in developing economies like Kenya.⁷¹ These economies have been unable to utilize the working-age to foster development⁷² as majority are not employed. The impact this has on the labour market is immense. Thus the employment issue has manifested itself in various ways in the labour market.

Skill and supply mismatch is a key issue in the Kenyan labour market.⁷³ Even with the high number of universities and colleges, the employers are not getting the required skills for the market. This has led to increase discussion as on the quality of the graduate the institutions are supplying to the labour market.⁷⁴ Most of the graduates are ending up in careers they were not

⁶²<https://www.nation.co.ke/news/counties-grind-to-a-halt-as-staff-go-without-pay/1056-5233246-W3otmm/Index.html>. (Nation Team.).

⁶³Owidhi George Otieno, 'An Economic Paper for Decision Making in Trade Unions in Kenya.'

⁶⁴*University of Nairobi v Kenya Universities Staff Union & 3 others [2018]eKLR.*

⁶⁵ibid.

⁶⁶ibid.

⁶⁷No.14 of 2007.

⁶⁸*Federation of Women Lawyers (FIDA) Kenya v Kenya National Union of Nurses & 4 others [2018] eKLR.*

⁶⁹ibid.

⁷⁰ibid.

⁷¹Collaborating Organizations: National Council for Population and Development (n 54).

⁷²ibid.

⁷³TIFA Research Limited., 'Skills Mismatch Survey' (2018).

⁷⁴IO& Oanda and J Jowi, 'University Expansion and the Challenges to Social Development in Kenya: Dilemmas and Pitfalls' (2012) 10 Jhea/Resa 49.

trained for at the learning institutions.⁷⁵ This is one of the causes according to the report of unemployment in Kenya.⁷⁶ This skill mismatch is also evident particularly between professionals, technicians and associate professionals and craft workers.⁷⁷ There is a shortage in craft workers in Kenya even with the high number of Technical, Vocational Education Training (TVET) institutions.

Retrenchment/Redundancy and Outsourcing

The Employment Act⁷⁸ defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. Various reasons have been attributed to this in the economy, such as technology innovation, uncertain economic times, shareholders' interest to make profit by minimizing costs among other factors that come with globalization. The effect of this to the labour market is that it has resulted to unemployment and even affected the trade union membership⁷⁹ in Kenya.

Recently, Telkom Kenya had a deal to merge with Airtel Kenya thus threatening to render most positions redundant.⁸⁰ The effect of this is to put the number of unemployed on increase. Another entity that is on the verge of being acquired by Kenya Commercial Bank is the National Bank of Kenya⁸¹. Such economic dynamics are a threat to the labour market.

In recent years, workers who have been rendered redundant have approached the court alleging unfair termination of employment. One of the notable ones was that of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others⁸² on the court of appeal where the in the High court the Union had successfully sued the Kenya Airways of unfair termination of employment. This had followed the company's restructuring of its operation that saw various positions rendered useless by the employer. However, on appeal the court by a majority, upheld the position of Kenya Airways limited. This saw loss of employment of over four hundred people in the company.

Outsourcing has also affected the labour market. Although it is not expressly provided in Kenyan labour laws, most companies especially private ones have adopted it from the advanced states such as Japan, United States and Europe.⁸³ Outsourcing has been defined as a process where a company subcontracts another firm in their production process with the aim of ensuring high

⁷⁵TIFA Research Limited. (n 74).

⁷⁶ibid.

⁷⁷Collaborating Organizations: National Council for Population and Development (n 54).

⁷⁸No. 11 of 2007 s.2.

⁷⁹Otieno (n 64).

⁸⁰Brian Ngugi, 'https://www.businessdailyafrica.com/Corporate/Companies/Telkom-Staff-Merger-Deal/4003102-5235854-Tc85nw/Index.html.'

⁸¹ ibid

⁸²[2014] eKLR.

⁸³Source Journal, No December and Shigemi Yabuuchi, 'Outsourcing , Income Distribution , and Unemployment Author (s): Shigemi Yabuuchi Stable URL : https://www.jstor.org/stable/41330833 Outsourcing , Income Distribution , and Unemployment' (2019) 26 705.

productivity, efficiency and profitability.⁸⁴ With globalization, international outsourcing has been common in less developed countries.⁸⁵ The effect of this has been felt in the labour market as it has reduced job opportunities and also affected trade unions dues.⁸⁶ The general effect of this has been on the social welfare of the workers.⁸⁷

The courts have been faced with this issue of outsourcing and have on several occasions pronounced themselves on it. Outsourcing disputes have occurred mostly where employee are being transferred to the outsourced company. The court of appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*⁸⁸ said that is an accepted concept in business today and that it enables a company to focus on production by reducing overhead costs, and increasing efficiency. The same court in the case of *Abyssinia Iron & Steel Limited v Kenya Engineering workers Union*⁸⁹ stated that outsourcing is not illegal in Kenya as long as it is carried out in accordance with fair labour practices envisaged in Kenyan constitution, and that it is not carried out with the intention of rendering an employee redundant.

Relevance and Adequacy of the Labour Institutions in Addressing the Issues

The Labour Institution Act⁹⁰ establishes five institutions; National Labour Board, Committee of inquiry, Labour Administration and Inspection, Wage Council and employment Agencies. These institutions are key in promoting a just labour relations in Kenya.⁹¹

The National labour Board whose composition is tripartite is vital in addressing the contemporary issues facing the labour market. From its advisory role to the cabinet secretary for labour, the board mandate range from advising the minister on employment issues, training and manpower development, labour legislation, employment relations, productivity measurement and improvement, and issues concerning trade unions among other under the Act.⁹² The board is further empowered to conduct investigation as it may consider necessary, and research into labour, economic and social policy.⁹³

The current issue of unemployment in Kenya should be a burning concern to the board since its composition is tripartite. The board power to investigate and research are crucial mandates that if used properly could see unemployment among the working-age bracket is solved. The skill mismatch in Kenya can be tackled by the board by advising the minister on the relevant training and manpower need in the labour market.

⁸⁴ibid.

⁸⁵Jan Rose, 'International Outsourcing When Labour Markets Are Unionized Published by : Wiley on Behalf of the Canadian Economics Association International Outsourcing When Labour Markets Are Unionized' (2019) 37 78.

⁸⁶ibid.

⁸⁷Journal, December and Yabuuchi (n 83).

⁸⁸[2014] eKLR. (n 22).

⁸⁹[2016] eKLR.

⁹⁰No. 12 of 2007.

⁹¹Otieno (n 64).

⁹²Labour Institution Act No. 12 of 2007. (n 33).

⁹³ibid.

The Committee of Inquiry⁹⁴ is supposed to be appointed by the minister to inquire on any trade dispute whether it has, or not been reported to the minister. The industrial strikes experiences in Kenya are in the public domain. The era of digital media should keep the minister on toes on any looming issues in the labour market. This should inform the minister to appoint such a committee so as to prevent suffering that results in such strikes.

As much as these institutions are provided for in law, their impact to the current issues have not been felt.⁹⁵ It has been argued that the National labour Board has not been consistently meeting thus affecting the quality of labour relations, and in turn causing industrial injustice.⁹⁶ Also there is no record on any research done by the board on labour, economic and social policy,⁹⁷ beside this being a very critical role that is important to the labour market.

The committee of inquiry has not known to be formed when such industrial dispute loom. This poor response has affected the industrial relations in Kenya.⁹⁸ Thus, the relevancy of the committee has never been felt by Kenyans.

The Employment and Labour Relation Court,⁹⁹ as an important institution for social dialogue, have noted that outsourcing could possibly be abused by employers. In this regard it had to set the principles to guide this new business practice. In *Wrigley Company (East Africa) limited v Attorney General & 2 others & another*¹⁰⁰ the court set the parameters to be;

- a) Ordinarily, employers are not expected to outsource their core functions;
- b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
- c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
- d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

These parameters seek to protect the employee greatly. However, the court is still faced with a bulk of labour related cases. Bearing in mind the importance of labour, the delay in concluding cases have caused injustice to many families.

Reforms to Strengthen the Labour Institutions

Labour institution play a fundamental role in ensuring just industrial relations in any economy.¹⁰¹ Therefore with the current challenges, they are supposed to be more proactive in addressing

⁹⁴ibid s28.

⁹⁵Otieno (n 64).

⁹⁶ibid.

⁹⁷Tubey, Rotich and Bundotich (n 26).

⁹⁸Otieno (n 64).

⁹⁹Constitution of Kenya 2010. National Council for Law Reporting Article 162 (2)(a)(n 2).

¹⁰⁰*Wrigley Company (East Africa) Limited v Attorney General & 2 others & another [2013] eKLR.*

¹⁰¹Otieno (n 64).

these matters since labour issues affect the social-economic welfare of the workers and society at large.

The national labour board should start carrying out its functions consistently as expected in addressing industrial issues efficiently.¹⁰² The main cause of industrial strike has been on fair remuneration. The board duty to advise the minister productivity measurement and improvement should be an opportunity on addressing the strikes. Kenya has no productivity formula among its public employee despite there being a **National Productivity and Competitiveness Centre (NPCC), which was formerly known as the** Productivity Centre of Kenya.¹⁰³ The current kaizen philosophy based on the idea of continuous improvement is not effective. An employee should be remunerated based on the output realized. The minister, therefore, should convene a social dialogue on the necessity of developing a productivity formula. The dialogue should even escalate to the International Labour Organization for much deliberations.

On its duty to advice the minister on labour laws, the board should take this mandate seriously, by taking a comparative analysis of laws and regulations of other jurisdictions on emerging labour issues. For instance, the United Kingdom's Transfer of Undertakings (protection of employment) Regulations (TUPE) that govern transfer of employees, can be adopted and reformed to curb the problems that arise out of outsourcing. The committee of inquiry should be more proactive. The minister of labour should appoint the committee expeditiously whenever there is an unfair labour outcome.

Due to high rate of unemployment in Kenya, employment agencies have been linking Kenyans to jobs abroad. The reality that dawns on the innocent Kenyans are poor working conditions, sexual exploitation, poor remuneration and even confiscation of their travel documents¹⁰⁴. The rise of scrupulous agents should be investigated by the board since it relates to employment and labour. There is need to create proper public awareness to Kenyans. Also the minister should seek International Labour Organization intervention.

The Employment and labour relations court has been faced with a bulk of cases. It is high time the National labour Board advice the minister on the importance of adopting alternative dispute resolution mechanism to resolve labour disputes. This mechanism will complement the court on its work.

Conclusion

History has informed Kenya currents labour laws. Contemporary issues have reshaped our thinking of the laws. The world having turned into a global village, labour forms a key component that needs to be protected by the laws. Ensuring social-economic rights are realized shall promote sustainable human development, equity and dignity.

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