Labour Laws and Regulatory Practices in Kenya: An Analysis of Trends and Dynamics

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Abstract
The adoption of national labour laws and regulations is an important means of implementing international labour standards, guaranteeing Decent Work and promoting the Rule of Law. As they regulate constantly evolving employment and industrial relations, labour laws are subject to regular assessment and reforms. Under the ILO Constitution, the Office is committed to extending its advisory services to Member States and to assist tripartite constituents in assessing and, where necessary, framing or revising their national labour laws. The Office provides technical advice based on international labour law and comparative labour law best practices. (Kaufman, 2004)

Salamon, (2005) stipulates that as companies grow, employee policy manuals have to grow with the organization. Companies will have to hire new employees and new supervisors, and that means they will need to commit to writing exactly how employees ought to be treated and the behaviors the company won’t tolerate. In general, employment legislation is expanding to cover a larger group of employees. Along with gender, race, color, religious beliefs, national origin, age and disability, some jurisdictions protect employees who are discriminated against on the basis of appearance or sexual orientation.

Key Words
Labour Laws, Employee Relations, National Labour Laws and International Labour Laws

I. Introduction
According to Aluchio, (2005), employment creation and poverty reduction are important areas of policy concern in most developing countries including Kenya. All development policies and programmes that have been formulated in post-independent Kenya have been geared, in one way or another, towards promoting employment growth and poverty reduction. The government’s current blueprint, the Economic Recovery Strategy for Wealth and Employment creation, is also built around high and sustained economic growth capable of fostering the creation of productive and durable employment opportunities. The Strategy Paper targets creating 500,000 jobs annually and reducing poverty levels in the country by at least five percentage points by the end of 2007.

The government has, since independence in 1963, implemented minimum wage policy as one of the means of improving the living standards of workers and promoting employment creation. This is in line with the recognition that low wages and unemployment are the major determinants of poverty in the country. Available data, however, indicate that poverty and unemployment levels in the country have continued to rise despite the minimum wage policy. The number of people living in poverty in Kenya has grown from 3.7 million in 1972-73 to 11.5 million in 2004 and was estimated to have reached 17 million or 56.8 per cent of the population in 2011. (Aluchio, 2005)

Employment relations in Kenya are regulated by a number of sources: constitutional rights, statutory rights, as set out in statutes and regulations, rights set by collective agreements and extension orders of collective agreements, and individual labour contracts. These legal sources are interpreted by the Industrial Court, and in some cases by the ordinary courts. A particularly important role to play has the tripartite Industrial Relations Charter that laid the foundation for an industrial relations system already prior to Kenya’s independence in 1963. International standards, especially ILO Conventions ratified by Kenya are used by the government and courts as guidelines, even though they are not binding. (COTU (K), et al 2003)

II. Main Review
A. The Evolution of Labour Law in Kenya
Kivutha, (2003) states that the genesis of labour law and practice can be traced to the 19th century when need arose for the colonial government to pass legislation to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the service sector. Terms and conditions of employment were regulated by statutes and the common law. The law of contract in Kenya was originally based on the Contract Act, 1872, of India, which applied on contracts made or entered into before 1st of January 1961. The Indian Contract Act applied to the three countries Kenya, Tanzania and Uganda. Since then the Kenyan law of contract has been based on the English common law of contract, under the Kenyan Law of Contract Act (Cap. 23), section 2 (1).

With industrialization, towards the middle of the 20th century, an organized trade union movement was well established. As a result, in October 1962, a landmark was established with the signing of the Industrial Relations Charter by the government of Kenya, the Federation of Kenya Employers and the Kenya Federation of Labour, the forerunner of COTU (K), the Central Organisation Of Trade Unions (Kenya).

The Industrial Relations Charter spelt out the agreed responsibilities of management and unions and their respective obligations in the field of industrial relations, it defined a model recognition agreement as a guide to parties involved, and it set up a joint Dispute Commission. The Industrial Relations Charter has been revised twice since then, but remained the basis for social dialogue and labour relations in Kenya throughout the years. With the set up of an Industrial Court in 1964, one additional basic cornerstone was laid for the development of amicable conflict resolution in Kenya. (Aluchio, L. 2005)

B. Criticism of The Kenyan Labour Laws
F.K.E et.al. (2008) argues that the new labour laws are constantly frustrating Kenyan employers as they continue grappling with the negative effects of implementing the regulations. While the new laws are seen by many as a boon to employees, they will
most likely lead to a major upset in the local job market. While
the intention of the labour laws is noble, the recently enacted new
labour laws are less likely to enhance the relationship between the
employers and employees. This is because they seem to favour
employees against employers. In actual fact, they might even
cause acrimony between the two parties.
It is indeed a fact that the changes that have occurred within the local
job market over the past few years as a result of structural adjustment
programmes, liberalisation of the economy and technological
innovations called for a review of the labour laws. The review of the
National Labour Laws had indeed been a concern to both the Kenyan
public and the Government for a long time. However, the manner
in which these laws were reviewed remains questionable. (F.K.E
et.al. 2008)
Aluchio, (2005) recognizes that at present businesses are suffering
a heavy burden of taxation among other costs. Therefore, the
introduction and entrenchment of requirements such as the medical
surveillance, Health and Safety Audits among others into the
laws is practically increasing the cost of doing business in the
country. Unfortunately, these changes were implemented without
stakeholder participation. It was quite clear, right from the start that
that the Department of Occupational Health and Safety (OHS) at
the Ministry had no capacity to carry out these activities without
loading the costs of the said activities onto businesses.
Of utmost concern are the Work Injury Benefits Act (WIBA)
and the Occupational Safety and Health Act which are basically
concerned with ensuring that oppressive practices are gotten rid of
at work places. Although the laws seek to protect employees’
rights and were apparently enacted to root out oppressive practices
at the workplace, they will negatively affect the job market as they
will make employment a very costly affair. WIBA is an Act of
Parliament that seeks to provide for compensation to employees
for work related injuries and diseases contracted in the course of
their employment and for other connected purposes. It should be
noted that the definition of a dependant in WIBA is too wide and
it can result in unnecessary litigation. The definition does not
also include an employee’s spouse. It would have been important
if the definition limited the dependants to the immediate family
only. Also included in the WIBA is the provision for compulsory
insurance of employees. This is rather unfortunate given that the
premiums have increased to levels that threaten the survival and
competitiveness of industries in Kenya. (Aluchio, 2005)
Aluchio, (2005) alludes that the provision on the right to
compensation also deprives employers an equal protection of
the law whenever an employee acts against set instructions.
This provision seems to condone an illegality by authorising
compensation for injury while the employee is involved in illegal
activities or contravenes the employer’s instructions. While
initially a beneficiary had to be a worker earning at least Ksh
33, 333 a month, the current Act accommodates all employees’
future increasing costs for employers. The WIBA has further
widened the meaning of the employee to include any worker on a
contract of service with an employer by removing the limitation of
the earnings level. Part V Section 30 of the Work Injury Benefits
Act says that compensation for permanent disablement shall be
calculated on the basis of earnings for 96 months subject to the
minimum and maximum amounts determined by the minister of
Labour.
F.K.E et.al. (2008) stipulates that it is worth noting that the
implementation of WIBA is already proving to be a challenge
because of lack of a platform for advising on the levels of
compensation and other matters related to it. The National
Labour Board which is expected to have a wider mandate that
includes appointment of members of the Industrial Court, setting
up of compensation benefits in accordance with WIBA and the
productivity committee has not yet been established. The Principal
Judge of the Industrial Court who will establish and gazette
divisions of the Court and designate certain Magistrates Courts
to hear matters relating to Labour Disputes was also supposed to
be appointed and empowered by the Board.
On the other hand, the Occupational Safety and Health Act
(OSHA) No 15 of 2007 provides for the safety, health and welfare
of workers and all persons who are lawfully present at workplaces.
It also provides for the establishment of the National Council for
Occupational Safety and Health and for other connected purposes.
OSHA introduced compulsory annual safety and health audits, risk
assessment and the requirement for a health and safety statement
by all employers. It is unfortunate that these undertakings are being
loaded upon employers instead of the government doing them at
its own cost. The cost of compliance with this requirement will
drive out small investors who will be unable to conform because
of lack of capacity to conduct the audits and assessments. (F.K.E
et.al. 2008)
While the government always emphasizes on public Private
Partnerships at all levels, the composition of the National Council
for Occupational Safety and Health are mainly government officials.
There is need to either incorporate private sector representation or
make the public sector representatives, ex-officio to avert them
from influencing decisions unfairly. One astonishing aspect of this
law is that the period under which employees could be considered
to have acquired occupational disease is broadened to capture
diseases that could incubate for a longer period after the exposure.
This is indeed a real burden for employers because they will have
to pay more in terms of treating the workers. (F.K.E et.al. 2008)
The provision of the eight-year compensation indeed portends
major problems for employers. Looking at it from the perspective
of employees whose take-home salary runs into over five-digit
figures; for instance, an employee earning, say, Sh 50,000 a month
would expect compensation of Sh 4.8 million while one earning
Sh1.2 million a month would expect Sh 115.2 million in case of
permanent disablement. These are outrageous amounts that could
result in the closure of many businesses. (F.K.E et.al. 2008)
According to F.K.E et.al. (2008) whereas the enactment of Labour
laws is not bad, because they help in enhancing employer/employee
relations in any given country, the recently enacted regulations in
Kenyan were ill-advised because they will cause a lot of acrimony
between the two entities. The government should have held more
consultations with the stakeholders before enacting the laws in
order to reach a consensus

C. The Way Forward
(a) Exchange ideas and share experience with partners from
other countries
(b) Learn new instruments to improve and liberate workers
welfare
(c) Get more new friends to collaborate within the struggle to
liberate workers
(d) Constructively engage will all stakeholders like trade Unions,
government, growers/ employers and associations to respect
and cooperate citizenship.
(e) Conduct research on whether codes of conduct have brought
about real improvement in the material wealth, social
well-being and empowerment of workers and other local stakeholders.

(f) To train more social auditors and awareness educators in Kenya
(g) Monitor the implementation of the new labour laws

III. Summary and Conclusion

International labour standards should be the basis for the development of labour legislation in any country, particularly concerning the Fundamental Principles and Rights at Work as established in the ILO Declaration. It is recommended that the views of the social partners are taken into account when formulating the specific labour legislation of any country, since they will facilitate the future application of such laws. In order to be able to design and conduct a process of labour law making that takes into account the views of the social partners, the Programme can offer courses on how to analyse and design the process, how to apply modern drafting techniques and how to draft or revise labour laws in accordance with the ILO standards. (Budd, 2004)

Ackers, (2004) alludes that Labour laws and regulation is considered increasingly important to the implementation of economic and social policies on both the national and international level. In order to regulate and stabilize the labour market, and ensure decent work for all, countries need to develop a coordinated labour management system and national labour policies. The labour management system – often coordinated by a labour ministry – deals with the implementation of policies, programmes and services related to many different areas. These include employment (such as employment services, unemployment security schemes, vocational training and others); labour standards (such as labour inspection and the dissemination and supervision of standards related to working conditions, salaries, employment relationships, occupational safety and health, social security, and others); industrial relations (such as the definition of the framework and rules for representation, collective bargaining, resolution of labour disputes and promotion of social dialogue in general); research (recollection of data and statistics, surveys, projections), and so on.

According to Befort, et.al. (2009) labour management system has to be well coordinated in order to work effectively. However, more often than not officials are only knowledgeable about their specific work area; therefore, they have difficulty in perceiving the system as a whole and in connecting their policies with other areas. Insufficient knowledge of the roles and functions of the system as a whole can also be a problem for newly elected authorities and new officials, as well as for specialists and those providing technical assistance in a specific area.

References

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