
Evaluation of the demeaning face of COVID-19 on labour relations: a new challenge for Kenya's burgeoning democracy

Ratemo Tom Junior*

1. Introduction. 2. A quest for effective health and safety considerations at workplaces amid COVID-19. 3. Integrating Telework in Kenyan Labour Law. 4. Leave entitlement amid COVID-19. 5. Termination of employment contracts amid COVID-19: issues and implications in employer-employee relations. 6. Conclusions.

Abstract

On March 11th 2020, the World Health Organization was forced to declare the novel coronavirus disease a global pandemic after a surge in reported cases of the disease outside China. The disease has adversely affected, *inter alia*, the economy and healthcare system in several countries including Kenya. To eradicate the pandemic, the Kenyan Government introduced numerous measures designed to control the infection rate which, *inter alia*, included closing of non-essential businesses and learning centers, restriction of people movements between 7.00pm and 5.00am and implementation of social distancing rules. These measures have compelled several public and private business entities to either shut or scale down their level of operations in order to remain afloat amid the pandemic. The existing Kenyan labour laws neither incorporate provisions on crisis response nor address the issue of employee safety while working from home. This article therefore seeks to delineate the legal implications of the disease on labour relations in Kenya. Besides, a discussion on the shortcomings of the existing labour laws in safeguarding employers and employees' rights to *i.e.*, health, safety, leave and termination amid the pandemic is undertaken. It finally proposes measures to be undertaken to fix the loopholes in such laws.

Keyword: COVID-19; Health; Safety; Leave; Termination.

* Lecturer of Labour and Constitutional Law, Kenyatta University, Nairobi, Kenya. This essay has been submitted to a double-blind peer review process.

1. Introduction.

On March 11th 2020, the World Health Organization officially declared Corona Virus Disease [hereinafter referred to as COVID-19]¹ a global pandemic.² The disease has since then caused healthcare and economic mayhem in several countries including Kenya.³ The drastic measures introduced by the Government of Kenya to counter the pandemic after the first case of the disease was confirmed *i.e.*, shutting down of non-essential businesses and learning centers, restriction of people movements between 7.00pm and 5.00am, suspension of international and domestic passenger flights and other public transport systems and implementation of social distancing rules have equally dealt a blow to several public and private business entities, which have inevitably been compelled to either shut or scale down their level of operations in order to remain afloat amid the pandemic.⁴

Such measures have also compelled most employers to make significant adjustments at their workplaces and have unfortunately resulted in colossal losses among employers making them unable to sustain a number of their employees.⁵ The measures have thus resulted to

¹ The Coronavirus disease is a novel highly infectious respiratory disease that emanated in Wuhan, China in the late 2019. The disease caused by SARS-CoV2 is spread largely through droplets of saliva or fluid discharges from one person to another.

See, Sauer L., *What is Coronavirus?*, available at <<https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus>> accessed on 8th July 2020; World Health Organisation, *Coronavirus*, <https://www.who.int/health-topics/coronavirus#tab=tab_1> accessed on 8th July 2020; World Health Organisation, *Coronavirus Disease: What You Need to Know*, <<https://www.afro.who.int/news/coronavirus-disease-what-you-need-know>> accessed on 8th July 2020; Mayo Clinic, *Coronavirus Disease 2019*, <<https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>> accessed on 8th July 2020.

² World Health Organisation, nt. (1).

³ Through Legal Notice No. 37 and in exercise of the powers under Section 35 of the Public Health Act Cap.242, the Cabinet Secretary for Health, on 27th March 2020, through the Public Health (Declaration of Formidable Disease) Order 2020 declared coronavirus disease to be a formidable epidemic disease in Kenya, *see*, National Council for Law Reporting Library, *Declaration of Formidable Epidemic Disease*, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN37_2020.pdf> accessed on 9th July 2020.

⁴ Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020, rule 4 & 5. *See*, Ministry of Health, *First Case of Coronavirus Disease Confirmed in Kenya*, <<https://www.health.go.ke/wp-content/uploads/2020/03/Statement-on-Confirmed-COVID-19-Case-13-March-2020-final.pdf>>, accessed on 8th July 2020; Aluga A. M., *Coronavirus Disease 2019 (COVID-19) in Kenya: Preparedness, Response and Transmissibility*, in *Elsevier Public Health Emergency Collection*, 20th April 2020, available at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7167550/>> accessed on 8th July 2020; Chiba Y., *Community Infections Could Happen Anytime: Kenya Prepares for Covid-19*, in *The Guardian*, 19th March 2020 <<https://www.theguardian.com/global-development/2020/mar/19/community-infections-could-happen-any-time-kenya-prepares-for-covid-19-coronavirus>> accessed on 8th July 2020. *See also*, Ministry of Health, *Interim Guidance for Health and Safety Measures in Workplaces in the Context of COVID-19*, 9th June 2020 <<https://www.health.go.ke/wp-content/uploads/2020/06/INTERIM-GUIDANCE-FOR-HEALTH-AND-SAFETY-IN-WORKPLACE.pdf>> accessed on 8th July 2020.

⁵ Otieno B., *Government Allows Hotels to Reopen Under Tight Anti-virus Rules*, in *Business Daily*, 27th April 2020, <<https://www.businessdailyafrica.com/news/Covid19-Hotels-to-reopen-under-tight-rules/539546-5535958-2vl7iez/index.html>> accessed on 8th July 2020; *See also*, Kihui N., *Restaurants Set to Reopen in Kenya Under Strict Measures Amid COVID-19 Fears*, in *The Capital News*, 27th April 2020 <<https://www.capitalfm.co.ke/news/2020/04/restaurants-set-to-re-open-in-kenya-under-strict-measures-amid-covid-19-fears/>> accessed on 8th July 2020; Ministry of Health, *Government Extends Time of Closure for Restaurants*, 16th June 2020 <<https://www.health.go.ke/government-extends-time-of-closure-for-restaurants-airobi-tuesday-june-16-2020/>> accessed on 8th July 2020.

retrenchment, wage/salary reduction and employees being forced to take unpaid leave during COVID-19 pandemic.⁶

The employment sector in Kenya is governed by the Constitution of Kenya 2010 [hereinafter referred to as *COK*], collective bargaining agreements and several other statutory laws and regulations designed to deal with diverse labour matters *i.e.*, employer-employee rights and duties.⁷ The emergence of COVID-19 has unmasked a number of issues that the existing labour laws do not adequately address. For instance, the laws are neither responsive to the emerging pandemics that have a great impact on labour relations nor do they address the issue of employee safety while working from home. This study will therefore delineate implications of COVID-19 on labour relations in Kenya. Besides, a discussion on the shortcomings of the existing labour laws in safeguarding employers and employees' rights to *i.e.*, health and safety, leave and termination amid the pandemic is undertaken. These three areas are specifically chosen based on the following reasons: *first*, the fact that COVID-19 is gradually being considered as an employment injury in Kenya calls for putting in place proper measures to protect the life, health and safety of employees. The disease has not been captured at present in labour statutes as an 'occupational disease' to attract an employer's liability for provision of *i.e.*, insurance policy and compensation particularly where an employee contracts the disease out of and in the course of employment. This paper therefore illustrates that such failure has led to insurmountable suffering by employees predominantly in situations where employees cannot access insurance covers when admitted in hospitals for contracting COVID-19. *Second*, of late, some employers, without consultation, are forcefully sending home their employees either on annual or unpaid leave citing dwindling revenue due to COVID-19. This paper demonstrates that such an act expressly amounts to revision/breach of employment terms and conditions, a situation not envisaged by the Employment Act 2007, the Employment (General) Rules 2014 and International Labour Standards. Besides, the paper endeavours to answer questions such as: whether an employer should cater for medical expenses for an employee who has contracted COVID-19 but is on annual or unpaid leave and whether an employee subjected to quarantine should be granted sick leave when it cannot be positively established that s/he is suffering from COVID-19. *Third*, employers are terminating services of their employees as they can no longer sustain them due to dwindling revenue caused by the negative impact of COVID-19. The citizenry is for instance unable to purchase goods or hire services due to stringent measures the Government has put in place to curtail transmission of COVID-19 (for *e.g.*, restriction on movement of people from one town to another that directly impedes movement of goods and provision of services). This paper therefore analyses various provisions governing lawful termination of employment contracts amid COVID-19. Specifically, the paper demonstrates

⁶ Several employees of Nation Media Group, Kenya Airways, Nairobi Hospital, *etc.*, have had their salaries temporarily deducted by up to fifty percent, meant to work overtime or retrenched due to the plunge in revenues caused by coronavirus pandemic, *see*, Watta E., *Pay Cuts, Layoffs: Kenyan Media is in for a Tough Time as Ads Drop*, in *Association Internationale De La Presse Sportive*, 19th May 2020 <<https://www.aipsmedia.com/index.html?page=artdetail&art=28065&CoronavirusKenya.Post-COVID-journalism>> accessed on 8th July 2020; Muiruri K., *Kenya Airways Staff To Take Pay Cuts as Coronavirus Hits*, in *Citizen News*, 21st March 2020 <<https://citizentr.co.ke/business/kenya-airways-staff-take-pay-cuts-as-coronavirus-hits-ceo-allan-kilavuka-to-take-80-cut-327429/>> accessed on 8th July 2020.

⁷ Most of the current set of labour laws were enacted in 2007 *i.e.*, the *Employment Act*, the *Labour Institutions Act*, the *Labour Relations Act*, the *Occupational Safety and Health Act* and the *Work Injury Benefits Act*.

that under the Kenyan labour laws, an employer cannot, under the guise of the adverse effects of COVID-19, declare redundancy or terminate an employee's contract of service without following due process.

2. A quest for effective health and safety considerations at workplaces amid COVID-19.

To guarantee the highest degree of social, mental and physical wellbeing of employees, employers are legally bound to ensure a healthy and safe working environment for their workers and third parties (*i.e.*, customers and members of the public at large) by essentially designing, providing and maintaining safe places of work; identifying, preventing and eliminating any potential hazard; providing personal protective gears to employees; affording sufficient first aid facilities; setting up contingency plans to deal with emergencies and accidents at workplace; consulting employees about their safety at workplace, *etc.*⁸ Equally, in recognizing the principle of democracy, it is the duty of the Government, in consultation with the employers and employees to develop occupational health and safety legislations and policies and more importantly, to ensure that they are enforced.⁹

The occupational health and safety at workplaces is a significant issue not only due to the rapid industrialization and agricultural developments taking place globally, including Kenya, but also as a result of the chain of challenges and sufferings now posed by the emergence of COVID-19. The International Labour Organization [hereinafter referred to as ILO] has approved over eighty Standards and Codes of Practices that explicitly deals with health and safety at workplaces.¹⁰ Key among them are the Occupational Safety and Health Convention 1981 (No. 155)¹¹ as well as the Promotional Framework for Occupational Safety and Health Convention 2006 (No.187) and its accompanying Recommendation (No.197) that seeks to advance the organization's two basic cornerstones of health and safety at workplaces, *i.e.*, the application of a system approach to the management of occupational health and safety at both national and enterprise levels and the building and maintenance of a national preventive health and safety culture.¹²

Amid COVID-19, the ILO's Safe to Work Guide for Employers on COVID-19 Prevention also mandate the employers to ensure good hygiene at workplace by, *inter alia*,

⁸ Tadesse T., Admassu M., *Occupational Health and Safety*, University of Gondar, Gondar, 2006, 5 <https://www.cartercenter.org/resources/pdfs/health/ephti/library/lecture_notes/env_occupational_health_students/ln_occ_health_safety_final.pdf> accessed on 8th July 2020.

⁹ Alli O. B., *Fundamental Principles of Occupational Health and Safety*, 2nd ed., International Labour Organisation, Geneva, 2008, 21 <https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf> accessed on 8th July 2020.

¹⁰ They, *inter alia*, include: the Promotional Framework for Occupational Safety and Health Convention 2006 (No.187); the Occupational Safety and Health Convention 1981 (No. 155), the Occupational Health Services Convention 1985 (No. 161); the Occupational Safety and Health (Dock Work) Convention 1979 (No. 152); the Safety and Health in Construction Convention 1988 (No. 167), the Guidelines on Occupational Safety and Health Management Systems 2001.

¹¹ Article 13 of the Convention entitles employees to leave their workplaces when they are facing imminent and serious danger to their health and safety. Employees cannot face undue consequences for acting as such. It is however important for the employees to notify the employer before leaving.

¹² Alli O. B., nt. (9).

establishing regular cleaning protocols, involving experts on prevention of COVID-19 and placing conspicuously posters that remind employees to regularly sanitize or wash their hands.¹³ All these safety guidelines that ILO has introduced are based on the fact that COVID-19 may safely be considered as an employment injury under the scope of the Social Security (Minimum Standards) Convention 1952 (No.102) and the Employment Injury Benefits Convention 1964 (No.121) particularly where it is contracted out of and in the course of employment.¹⁴

The COK also incorporates candid provisions in regard to health and safety measures at work places.¹⁵ Part 2, Chapter 4 of the Constitution mandates every employer, particularly during and after COVID-19, to ensure each employee is subjected to reasonable working conditions.¹⁶ Cognizant of the infectious nature of COVID-19, the prerequisite of reasonable working conditions, *inter alia*, includes provision of the basic gears meant to curtail the transmission of the disease *i.e.*, hand washing stations with soap and water or alcohol-based hand sanitizers, spacious well ventilated offices with ample light, infrared thermometers for checking temperatures of employees and customers, personal protective gears *e.g.*, surgical masks, isolation gowns, bouffant hats, examination gloves and face shields.¹⁷ In *Rashid Odhiambo Allogoh & 245 Others v Haco Industries Ltd.*,¹⁸ the Court of Appeal at Nairobi observed that by dint of Article 41 of the COK, the Courts are increasingly appreciating the need to balance economic development and employees' concerns for social justice. In other words, while employers have discretion to adopt strategies promoting profitability and sustainability of their investments, it is equally significant that they recognize and uphold employee rights enshrined under Article 41 and other enabling laws particularly their right to work in a safe and healthy environment.

To supplement the provisions of the COK, Parliament enacted the Occupational Safety and Health Act 2007 [hereinafter referred to as OSHA], a core legislation that, *inter alia*, provides for the health, welfare and safety of employees and every person present at an employer's place of work.¹⁹ The Act not only offers an insight as to the feats and steps to be undertaken by employers in case of an outbreak of COVID-19 at their workplace, but it also mandates employers to provide employees, free of cost, necessary protective gears used in performance of their duties.²⁰ Besides, it is upon employers to ensure that the place of work is always clean and free from effluvia, well ventilated, adequate lighting and not overcrowded.²¹ In maintaining cleanliness, the Act provides that the workplace floors should

¹³ International Labour Organisation, *Safe to Work Guide for Employers on COVID-19 Prevention*, 3, ILO, Geneva, 2020.

¹⁴ Employment Injury Benefits Convention 1964 (No.121), art.7 & 8, sch.1, Para.29 and the Social Security (Minimum Standards) Convention 1952 (No.102), art.32.

¹⁵ Constitution of Kenya 2010, arts.2(5) & (6), 27(4), 41(2)(b), 42, 43(1)(a), 46(1)(c), 66(1), 70(1)&(2)(c).

¹⁶ *Ibid*, art. 41(2)(b).

¹⁷ These working conditions are in *pari materia* with those prescribed by the World Health Organization. See, Ministry of Health, *Interim Guidance for Health and Safety Measures in Workplaces in the Context of COVID-19*, 9th June 2020, p.3 <<https://www.health.go.ke/wp-content/uploads/2020/06/INTERIM-GUIDANCE-FOR-HEALTH-AND-SAFETY-IN-WORKPLACE.pdf>> accessed on 8th July 2020; World Health Organization, *Getting Your Workplace Ready for COVID-19*, 3rd March 2020 <<https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?ua=1>> accessed on 21st October 2020.

¹⁸ [2015] eKLR: Civil Appeal No. 10 of 2008 at 7.

¹⁹ Occupational Safety and Health Act 2007, Preamble.

²⁰ *Ibid.*, Ss.10, 101(1) & 102.

²¹ *Ibid.*, Ss.47(1), 48(1), 49(1) & 50(1).

be cleaned by either washing or sweeping at least once in every week and all walls as well as staircases and ceilings to be cleaned at least once in every twelve months if the surfaces are smooth impervious or once in every five years where the surfaces are oil painted.²² This requirement cannot be applicable with respect to COVID-19 as the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules 2020 requires that the workplace should be regularly and thoroughly cleaned with Kenya Bureau of Standards approved disinfectants capable of inactivating pathogens and other microorganisms in a bid to combat the disease.²³

The OSHA further obligates employers to conduct risk assessment and adopt preventive measures as well as regularly maintain the working environment in a state that is safe devoid of health risks.²⁴ Accordingly, it is the duty of the employer to inform employees working on COVID-19 infected areas, surfaces or substances of the risks they are exposed to.²⁵ In *Kenya County Governments Workers' Union case*,²⁶ *Purity Wambui Muriithi case*,²⁷ *Nancy Njeri Nyoike case*,²⁸ *Wilson & Clyde Coal Co. case*,²⁹ *Samson Emuru case*³⁰ and *Bernard Muthimbi Njenga case*³¹ as cited in *Faith Mutindi Kasyoaka case*,³² the Court held that the employer must guarantee the health, welfare and safety of employees and such a duty includes not to merely caution workers against imminent dangers but to also make the workplace as safe as the exercise of reasonable care and skill permits. This simply implies that if an employee is injured or contracts COVID-19 merely because the employer did not take trouble to facilitate the workman with essential safety gadgets, it is reasonable to allege that the s/he failed to perform his/her duty.³³ However, it is equally a duty upon an employee as it was held in *David K. Kariuki case*³⁴ and *Makala Mailu Mumende case*³⁵ that s/he must perform assigned duties while wearing protective clothing and must take precautions on his/her health, security and safety and that of others.³⁶ Employees cannot therefore claim that they contracted COVID-19 at workplace when they were provided with necessary protective gears but failed to use them and/or follow the health protocols designed to prevent the pandemic. This apart, it is a requirement under Part IV of the Public Health Act Cap 242 for employees to isolate themselves when they discover that they have been infected with COVID-19.³⁷ Failure to do so will attract a fine of up to thirty thousand Kenya shillings or

²² *Ibid.*, S.47(1)(b) & (c).

²³ Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020, r.6(2).

²⁴ Ss.6(2)(d)(f) & 6(3), nt. (19).

²⁵ See *Iyere v Bendel Feed and Flour Mills Limited* [2008] LPELR-SC.309/2002 where the Supreme Court of Nigeria held that: "where there exists a service relationship between employer and employee, the former is under a duty to take reasonable care for the safety of the latter so as not to expose him to unnecessary risk."

²⁶ *Kenya County Governments Workers' Union v County Government of Nyeri & Another* [2015] eKLR.

²⁷ *Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd.* [2015] eKLR.

²⁸ *Nancy Njeri Nyoike v Garton Ltd.* [2016] eKLR. See, *Kiema Muthuku v Kenya Cargo Handling Services* [1991] KLR 464: [1988-92] 2 KAR 258; [1990-1994] EA 427; *Alex Mutugi v Mungania Tea Factory* [2020] eKLR; *Efil Enterprises Limited v Dickson Mathambo Kilonzo* [2018] eKLR: Civil Appeal No.28 of 2015.

²⁹ *Wilson & Clyde Coal Co. v English* [1938] AC 579.

³⁰ *Samson Emuru v Ol Suswa Farm Ltd.* HCCA No.6 of 2003.

³¹ *Bernard Muthimbi Njenga v Sokoro Saw Mills Ltd.*, Civil Appeal No. 38 of 1995.

³² *Faith Mutindi Kasyoaka v Safepark Ltd.*, [2019] eKLR: Civil Appeal No. 551 of 2014.

³³ *Rogers W. V. H., Winfield and Jolovics on Tort by WVH Rogers*, 14th edn., Sweet & Maxwell, London, 1994, 213.

³⁴ *David K. Kariuki v Amalgamated Saw Mills* [2016] eKLR.

³⁵ *Makala Mailu Mumende v Nyalii Golf County Club* [1991] KLR 13.

³⁶ S.13(1), nt. (19).

³⁷ Public Health Act Cap 242, s.28.

imprisonment for a term of not more than three years or both.³⁸ Similarly, the employer or Medical Health Officer or Public Health Officer are mandated under the Public Health Act Cap 242 and the Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020 to provide for disinfection of work places once the information on a suspected case of COVID-19 is brought to their knowledge, otherwise such an employer may be fined up to forty thousand Kenya shillings.³⁹

The Work Injury Benefits Act 2007 [hereinafter referred to as WIBA] is another significant legislation meant to provide mechanisms for employees to be compensated for injuries sustained and diseases contracted in the course of their employment.⁴⁰ The Act mandates every employer to obtain and maintain an insurance policy for his/her employees and to compensate any employee who is involved in an occupational accident or disease that results in either death or disablement (temporary/permanent).⁴¹ The claim for compensation for the injury or contracting of the disease specified in the Second Schedule of the Act must however be lodged before the Director of Occupational Safety and Health Services within a period of twelve months.⁴² Even though Parliament did not mull over COVID-19 while enacting WIBA as being an ‘occupational disease,’ the Act has however not been amended till date to specifically capture provisions on liability and compensation where an employee contracts the disease out of and in the course of employment. This therefore leaves room for the Director of Occupational Safety and Health Services to establish whether an employee who unfortunately contracts the disease out of and in the course of employment (from for instance, a colleague, employer’s contractor or customer) can be compensated.

As noted above, it is equally the duty of the employers to obtain and maintain an insurance policy for his/her employees.⁴³ However, as a general global practice, the moment the World Health Organisation has declared a certain disease as a pandemic/epidemic, no insurance policy will cover such a disease.⁴⁴ This is one of the excuses that most Kenyan insurance companies used to initially refuse to cover COVID-19 patients.⁴⁵ Moreover, the Government sponsored National Health Insurance Fund, though popular, has very limited coverage and low reimbursement rates and thus it cannot attract most employers and private health facilities.⁴⁶ As a result, though there is now a Medical Insurance Solution for COVID-19, some insurance companies have either declined to cover the diseases particularly if contracted during travel or they offer minimal cover for patients admitted in hospitals due to COVID-19.⁴⁷ This is despite the fact that Part III of the WIBA provides that an

³⁸ *Ibid.*

³⁹ S.29, *ibid* and Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020, r.6.

⁴⁰ Work Injury Benefits Act 2007, Preamble.

⁴¹ *Ibid*, ss.7(1), 10(1) & 12.

⁴² *Ibid*, ss.26(1) & 36(1).

⁴³ *Ibid*, ss. 7(1).

⁴⁴ UAP Old Mutual Group, *Frequently Asked Questions About the Coronavirus (COVID-19)*, <<https://www.uapoldmutual.com/faqs-covid-19>> accessed on 10th July 2020.

⁴⁵ Kirengo T., *We’re also Making Hand Sanitizers: Kenyan Doctor on COVID-19 Impact*, <<https://www.centerforfinancialinclusion.org/were-also-making-hand-sanitizer-kenyan-doctor-on-covid-19-impacts>> accessed on 10th July 2020.

⁴⁶ *Ibid.*

⁴⁷ For instance, Prudential Life Assurance Company offers only two thousand five hundred shillings per night if a COVID-19 patient is admitted in hospital, *see*, Prudential Life Assurance, *Prudential Customers to Get Extra Benefits if Diagnosed with COVID-19*, 29th March 2020, available at: <https://www.prudentiallife.co.ke/media/press-release/2020-03-29/7009/> [accessed on 10th July 2020]. UAP Old Mutual Group’s Travel Insurance Solution

employee's conveyance to and from work while using an employer's purposed vehicle for employee transportation is considered to be in the course of an employee's employment.⁴⁸ This therefore implies that an employer cannot be held liable for injuries sustained or diseases contracted (*i.e.*, COVID-19) while an employee is travelling to and from the workplace using either private or public transport means. Consequently, it is high time for the twelfth Parliament to move with speed and pass legislations meant to ensure that an employee is insured and adequately compensated if s/he contracts COVID-19 while travelling to and from his/her workplace.

Besides OSHA and WIBA, Parliament also enacted the Employment Act 2007 that requires employers to adequately provide employees with medicine during sickness and '*if possible, medical attendance during serious illness.*'⁴⁹ This however can be achieved if the following four conditions are fulfilled: *first*, the employer ought to take reasonable steps of ensuring that the employee, without undue delay, notifies him/her of the illness, *second*, the employee must have contracted the illness out of and in the course of his/her employment, *third*, the illness should not be as a result of self-infliction and *fourth*, the employee must not be under any medical scheme provided free of charge by the Government or where an employer has maintained an insurance policy for the employee.⁵⁰ These provisions have enabled some workers *i.e.*, medical practitioners to get medical treatment and compensation for contracting COVID-19. However, the words contained in Subsection 1 of Section 34 of the Employment Act 2007 *i.e.*, '*if possible, medical attendance during serious illness*' raise queries as to whether employers are obligated to meet all medical expenses till an employee infected with COVID-19 fully recovers and as to whether employers may rely on the words '*... if possible ...*' to deny cover for such patients.

3. Integrating Telework in Kenyan Labour Law.

Generally, the existing labour laws in Kenya do not incorporate guidelines for 'working from home' or 'remote work /telework.' The Employment Act 2007 and the Employment (General) Rules 2014 specifies that the employment contract or letter of appointment should indicate the place and hours of work of an employee.⁵¹ However, to curtail the transmission of COVID-19, the ILO and the Government of Kenya through the Ministry of Health's Interim Guidance for Health and Safety Measures in Workplaces in the Context of COVID-19⁵² and the Centre for Disease Control and Prevention's recently introduced best practice

done not cover COVID-19, *see*, UAP Old Mutual Group, nt. (44); Mwangi W, *Insurance Firms Agree to Cover Coronavirus Costs*, in Daily Nation, 13th March 2020 <<https://www.nation.co.ke/kenya/business/insurance-firms-agree-to-cover-coronavirus-costs--278040>> accessed on 10th July 2020.

⁴⁸ *See* nt. (40), s.10(5).

⁴⁹ Employment Act, 2007, s.34(1).

⁵⁰ *Ibid*, s.34(2) & (4).

⁵¹ *Ibid*, s.10(2)(f)(g) and Employment (General) Rules 2014, Second Schedule, r.6(e)(f).

⁵² Ministry of Health, *Interim Guidance for Health and Safety Measures in Workplaces in the Context of COVID-19*, 9th June 2020, p.3 <<https://www.health.go.ke/wp-content/uploads/2020/06/INTERIM-GUIDANCE-FOR-HEALTH-AND-SAFETY-IN-WORKPLACE.pdf>> accessed on 8th July 2020; International Labour Organisation, *Safe to Work Guide for Employers on COVID-19 Prevention*, ILO, Geneva, 2020, 3 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_744033.pdf> accessed on 10th July 2020; Guidance for Infection

manuals referred to as Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019, May 2020 advised employers to allow their employees to work from home (except those providing essential services) thus shifting the place of work of employees as indicated in signed employment contracts.⁵³ The Government also advised employers to replace essential physical meetings with meetings held via modern technology *i.e.*, by use of video conferencing facilities and applications *e.g.*, Zoom, Whatsapp, Microsoft Teams and Skype.⁵⁴ Besides, any employee who develops COVID-19 signs and symptoms while at work (*i.e.*, fever, cough and breathing difficulties) is required to be advised by the employer to immediately go home and contact the local public health authority.⁵⁵ In *Attorney General v Law Society of Kenya & Another*,⁵⁶ the Court of Appeal held that even though compensation (under WIBA) for personal injury is to be made particularly where an employee contracts a disease or is injured in the course of work, it should not be interpreted to literary refer to only 'work.' In such circumstance therefore, the injuries sustained or the diseases contracted while an employee works from home ought to be determined as to whether it is a result of a risk related to the nature of work that an employee is directed to perform by the employer.⁵⁷ The duty of an employer to facilitate reasonable working conditions is only restricted to workplaces and not at homes. In this context, the questions that beg for answers and which therefore needs to be urgently addressed are: whether the employer should be held liable in case of an injury sustained or diseases contracted while an employee works from home and not from the assigned place of work? Why should an employee be asked to go home after developing COVID-19 signs and symptoms while at work when the employer is supposed to facilitate transportation of him/her to the nearest health facility as required by Rule 34 of the Employment (General) Rules 2014? It is thus significant for the two parties (*i.e.*, employer and employees) to formally consent by amending

Prevention and Control for Coronavirus Disease (Covid-19) in Homes and Residential Communities, 18th March 2020, 3 <<https://www.health.go.ke/wp-content/uploads/2020/03/COVID-19-Plan-Prevention-and-Control-in-Communities.pdf>> accessed on 8th July 2020; Republic of Kenya, Directorate of Occupational Safety and Health Services, *Occupational Safety and Health Advisory on Coronavirus (Covid-19)*, 14th March 2020 <<https://www.health.go.ke/wp-content/uploads/2020/06/OCCUPATIONAL-SAFETY-AND-HEALTH-ADVISORY-ON-COVID-19.pdf>> accessed on 8th July 2020; Angote J., *The Future of Work Post COVID-19*, in *Daily Nation*, 13th May 2020 <<https://www.nation.co.ke/kenya/news/the-future-of-work-post-covid-19-284482>> accessed on 10th July 2020; ALN Kenya, *Preparing for a Safe Return to work*, *infra* nt. (54); Birir C., *Working from Home: How to Cope Amid Covid-19 Pandemic*, in *The Standard Newspaper*, 6th May 2020 <<https://www.standardmedia.co.ke/business/article/2001370376/covid-19-the-challenges-of-working-from-home>> accessed on 10th July 2020; Maina S., *Coronavirus Poses Ethical Concerns: A View on the Choices Being Made in Kenya*, in *The Conversation*, 22nd April 2020 <<https://theconversation.com/coronavirus-poses-ethical-concerns-a-view-on-the-choices-being-made-in-kenya-135338>> accessed on 10th July 2020.

⁵³ Centre for Disease Control and Prevention, *Interim Guidance for Businesses and Employers responding to Coronavirus Disease 2019*, May 2020, 6th May 2020 <<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>>: [accessed on 10th July 2020]. *See, Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, February 2020, <<https://www.rcan.org/sites/default/files/files/Employer%20Guidance.pdf>> accessed on 12th July 2020.

⁵⁴ ALN Kenya nt. (53), <<https://www.africalegalnetwork.com/kenya/wp-content/uploads/sites/22/2020/06/AK-Preparing-for-a-Safe-Return-to-Work.pdf>> accessed on 10th July 2020.

⁵⁵ Ministry of Health, *Interim Guidance for Health and Safety Measures in Workplaces in the Context of COVID-19*, nt. (52); Guidance for Infection Prevention and Control for Coronavirus Disease (Covid-19) in Homes and Residential Communities, nt. (52); Republic of Kenya, Directorate of Occupational Safety and Health Services, *Occupational Safety and Health Advisory on Coronavirus (Covid-19)*, nt. (52).

⁵⁶ [2017] eKLR: Civil Appeal No.133 of 2011.

⁵⁷ *See Sandberg v J. C. Penny* [2011] where the Court ordered for compensation of an employee who sustained injuries while performing official duties from home.

the employment contract details to also capture the place of work as ‘*an employee’s home*’ in order to avoid instances of breach of terms of the employment contract. Otherwise, it would be insurmountable for an employee to advance claims of liability against an employer for an incident that happened at home as such a cause cannot be deemed to be within the wide scope of an employer’s liability.

The Health Act 2017 is another piece of legislation meant to boost the health and safety efforts at workplaces in Kenya. Considering the infectious nature of COVID-19, the Act mandates the National Government, Department of Health to undertake measures aimed at managing COVID-19 particularly measures that: a) target elimination or reduction of the disease burden arising from poor sanitation and occupational exposure, b) transmission of diseases of international concern, c) promote establishment of quarantine facilities at borders, ports and frontier health services.⁵⁸ In carrying out its duty, the National Government needs to also ensure that Counties are roped in particularly in dissemination of public health guidelines.⁵⁹ Besides, Part II of the *Health Act*, 2017 outlines the rights and duties of public and private healthcare providers which, *inter alia*, include the right not to be discriminated against particularly where the healthcare provider contracts COVID-19, the right to a safe working environment that essentially reduces the risk of COVID-19 transmission among co-workers and clients along with duty to provide the best healthcare services to their clients.⁶⁰

4. Leave entitlement amid COVID-19.

Grant of leave is part and parcel of the service conditions of employees in Kenya and is usually granted by employers to enable employees to recuperate, renew energies and improve efficiency.⁶¹ The key legislations governing grant of leave to employees in Kenya are the Employment Act 2007,⁶² the Public Service Commission Regulations 2020, the Employment (General) Rules 2014 and the Code of Regulations 2006 for civil servants.⁶³ The Act however provides that leave can be regulated by a collective agreement or contract between employers and employees or provisions of an award/order/judgement of the Employment and Labour Relations Court particularly where the terms in relation to grant of leave are more favourable than those in the Act.⁶⁴ These legislations incorporate a number of leaves employees are entitled to and the process to be adopted in their grant or denial. For instance, amid COVID-

⁵⁸ Health Act, 2017, ss.68(2)(a)(d) & 69(a).

⁵⁹ *Ibid*, s.69(j).

⁶⁰ *Ibid*, ss.12(1)(a)(b) & 12(2)(a).

⁶¹ Ratemo T. J., *Laws Relating to Civil Servants in Kenya and India: A Critical Study*, (Ph.D. Thesis, Dr. Babasaheb Ambedkar Marathwada University, 2014) 216:

<https://shodhganga.inflibnet.ac.in/bitstream/10603/73362/12/12_chapter%203.pdf [accessed on 8th July 2020]. See nt. (49), s.26(1). See also, *S. R. Mebrotra (Dr.) v. H. P. University*, 1989 (1) SLR 112 (HP-DB).

⁶² See nt. (49), Part V.

⁶³ See Code of Regulations 2006, s.N.

⁶⁴ See nt. (49), s.26(2). See, *Kennedy Nyanguncha Omango v Bob Morgan Services Ltd* [2013] eKLR.

19, employees are entitled to sick leave,⁶⁵ paternity leave,⁶⁶ maternity leave,⁶⁷ annual leave,⁶⁸ unpaid leave,⁶⁹ leave of absence⁷⁰ and compulsory leave.⁷¹

The labour laws in Kenya mandate employees to formally apply for leave before absenting themselves from work.⁷² Penalties may be imposed for any employee who, on the excuse of COVID-19, proceeds on leave without permission or overstays beyond the days permitted.⁷³ In this context, the Employment and Labour Relations Court at Kisumu has in *Aggrey Kimiya Mukizya* case⁷⁴ held that once an employee's leave is sanctioned, it is not a gateway for an employee to unilaterally extend the permitted number of days without consulting an employer for possible extension. But, before one is granted leave, the authorities responsible must ensure the applicant fulfills the required formalities *i.e.*, an employee cannot be granted leave if his/her leave account is already exhausted or s/he is compulsorily retired or dismissed from service.⁷⁵ For that reason, it was observed in *Birendra Kumar Sinha* case⁷⁶ that an employee cannot claim grant of leave as of right. Equally, an employer cannot send an employee on forced leave without pay particularly now that the State is overwhelmed by COVID-19 cases.⁷⁷

In recent days, due to COVID-19 which has entirely reshaped the Kenyan economy, most private business entities with now dwindled revenue have been compelled to send home their employees on annual leave instead of deferring the same in order to cut down operational costs, a situation which is not envisaged by the Employment Act 2007 and the Employment

⁶⁵ Employment Act 2007, s.30 and the Employment (General) Rules 2014, Second Schedule, r.10.

⁶⁶ The leave entitles a male employee to two weeks paternity leave with full pay, *see*, *Supra* note 49, s.29(8), and Employment (General) Rules 2014, Second Schedule, r.11.

⁶⁷ The leave entitles a female employee to three months maternity leave with full pay and it can be extended with the consent of the employer, *Supra* nt. (50), s.29(1) and Employment (General) Rules 2014, Second Schedule, r.9.

⁶⁸ *See* nt. (49), ss.10(3)(a)(i) & 28 and Employment (General) Rules 2014, Second Schedule, r.8.

⁶⁹ After authorized officer and Committee on Human Resource Management Advisory consents, an employee may for purposes of attending to urgent private affairs of exceptional nature be granted six months unpaid leave but it can be extended once for another six months, *see*, Public Service Commission Regulations 2020, reg.39(1). *See also*, *Aligarh Muslim University v Mansoor Ali Khan*, AIR 2000 SC 2783: [2000] 7 SCC 529: [2000] 5 SLR 67 where the Supreme Court of India held that the power to extend leave of an employee must be reasonably exercised and where authorities decline to sanction leave, it must be based on justifiable grounds.

⁷⁰ This kind of leave is granted to public officers particularly after being appointed on contractual terms to another public/private/ international body but after they are recommended by the Ministry's authorized officer in consultation with the relevant Committee on Human Resource Management Advisory in which the employee is working. It is for a period of three years but can be extended once for another three years, *see, ibid*, reg.38(1)(2)&(3).

⁷¹ This is a punitive leave sanctioned by an authorized officer of a public body that sends an employee for thirty working days to pave way for proper investigation against the employee. It however must be approved by the Public Service Commission and an employee must be informed of reasons before proceeding on leave, *see, ibid*, reg.62(1) & (2).

⁷² *See* for instance, Code of Regulations 2006, s.N.2. *See also*, *Banking, Insurance and Finance Union (Kenya) v Barclays Bank of Kenya Ltd* [2014] eKLR where the Court held that an employee has an obligation to seek permission before remaining absent from duty.

⁷³ *See* nt. (69), s.66(1)(b) where an employee's pay can be stopped by the authorized officer and Section 67 thereof if an employee remains absent for ten days without reasonable or lawful excuse, s/he is subject to summary dismissal, *see*, *E. C. Joy v The Principal Bharathmatha College* [1981] (2) SLR 777 (Ker) and *Mohan Lal v Union of India*, [1992] (2) SLR 533 (P&H-DB).

⁷⁴ *Aggrey Kimiya Mukizya v Roy Parcels Services Ltd.* [2019] eKLR: Cause No.99 of 2016.

⁷⁵ *See* nt. (49), ss.68(c) & 74(1)(f)(g)(h).

⁷⁶ *Birendra Kumar Sinha v State of Bihar* [1969] Lab IC 742.

⁷⁷ *Punjab State Electricity Board v Gurdial Singh* [1989] (5) SLR 160.

(General) Rules 2014. Though the Employment Act 2007 envisages a situation where an employer may, in consultation with his/her employee, revise the employment terms,⁷⁸ this however can amount to breach of an employment contract in circumstances that an employee is compelled by an employer to proceed on leave yet there exists no mutual agreement between the two parties as envisaged in the revised Holidays with Pay Convention 1970 (No.132).⁷⁹ Similarly, it will be a breach of contract and international labour best practices where an employer sends an employee home on unpaid annual leave or deducts his/her salary when the Employment Act 2007 and the Employment (General) Rules 2014 categorically provide that an employee is entitled to twenty one days of such a leave with full pay after working for at least twelve consecutive months.⁸⁰ This therefore raises the question as to whether an employer should cater for medical expenses for an employee who has been sent on unpaid annual leave? The ILO's Medical Care and Sickness Benefits Recommendation 1969 (No.134) advocates for cash benefits for an employee whose salary is suspended or who cannot make it to work because s/he is either quarantined or undergoing preventive or curative medical care.⁸¹

The Employment Act 2007 and the Employment (General) Rules 2014 also guarantee employees who have contracted COVID-19 sick leave of seven days with full pay and thereafter seven days with half pay within twelve months of service.⁸² This however can only be granted if an employee has worked for two consecutive months, s/he notifies the employer and/or produced a duly signed Certificate of Incapacity from a registered medical practitioner.⁸³ Through collective agreement between an employer and employees, sick leave can be extended beyond the seven days legal requirement with full pay to about thirty days.⁸⁴ Thus, the provisions in the labour Statutes or the contract of employment can be adopted to grant sick leave to an employee who has contracted COVID-19 and is either quarantined or undergoing preventive or curative medical care. But the question that might crop up is whether an employee who is subjected to quarantine should be granted sick leave when it cannot be positively established that s/he is suffering from COVID-19? According to the World Health Organization and the Ministry of Health's COVID-19 Quarantine Protocols 27th March 2020, the recommended quarantine period in matters COVID-19 is fourteen days.⁸⁵ As such, an employee will not be able to attend to his/her official duties within the said days if quarantined. After the lapse of the quarantine period, an employee is discharged

⁷⁸ See nt. (75), s.10(5).

⁷⁹ Holidays with Pay Convention, 1970 (No.132), art.10.

⁸⁰ See nt. (49), ss.10(3)(a)(i) & 28 and the Employment (General) Rules 2014, Second Schedule, r.8. See also, *ibid*, art.10.

⁸¹ Medical Care and Sickness Benefits Recommendation, 1969 (No.134), para. 8.

⁸² See nt. (50), s.30 and the Employment (General) Rules 2014, Second Schedule, r.10. See also, International Labour Organisation, *ILO Standards and COVID-19 (Coronavirus)*, 29th May 2020, Version 2.1, 24, <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_739937.pdf> [accessed on 13th July 2020]; Social Security (Minimum Standards) Convention 1952 (No.102), part III and *ibid*, part III.

⁸³ See nt. (50), s.30 and the Employment (General) Rules 2014, Second Schedule, r.10.

⁸⁴ Regulation of Wages (General) Order, L.N. No. 139.

⁸⁵ World Health Organization, *Q & A on Coronavirus (COVID-19) - How Long Does It Take After Exposure to COVID-19 to Develop Symptoms*, <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses#>> accessed on 14th July 2020; Ministry of Health, *COVID-19 Quarantine Protocols* (27th March 2020), 14 <<https://www.health.go.ke/wp-content/uploads/2020/04/L-Quarantine-Protocols-for-Sites-with-Lab.pdf>> accessed on 14th July 2020.

if laboratory test results indicate that s/he is negative. Thus, once an employee is found to be COVID-19 positive, s/he will easily be eligible for grant of sick leave. However, it will be difficult to establish whether an employee is/was entitled to sick leave after being declared COVID-19 negative.

5. Termination of employment contracts amid COVID-19: issues and implications in employer-employee relations.

Desperate times call for desperate measures. Generally, no employee can be terminated without a valid reason.⁸⁶ However, due to COVID-19, employees are now facing the axe as employers can no longer sustain them.⁸⁷ The ILO Termination of Employment Convention 1982 (No.158),⁸⁸ the ILO Social Security (Minimum Standards) Convention 1952 (No.102),⁸⁹ the COK⁹⁰ and the Employment Act 2007⁹¹ mandates employers to ensure among others, fair labour practises by for *e.g.*, ensuring payment of severance allowances or other kinds of benefits to employees who for reasons such as the negative economic brunt of COVID-19 are terminated.⁹²

The existing labour laws in Kenya lay down several grounds upon which an employment contract can be lawfully terminated *i.e.*, on account of an employee's misconduct or physical incapacity or participation in unprotected strike and/or poor performance.⁹³ Thus, temporary absence from workplace due to sickness caused by COVID-19 cannot constitute a valid ground for termination of an employee.⁹⁴ In effect, termination can only be undertaken (as it was held in *Nation Media Group Limited* case⁹⁵ and *Pius Machafu Isindu* case⁹⁶) after an employer has issued a notice to the employee concerned within the timelines stipulated in the Employment Act 2007 and the Employment (General) Rules 2014 or otherwise pay the employee in lieu of notice.⁹⁷ Moreover, the employer, according to *Bamburi*

⁸⁶ Termination of Employment Convention 1982 (No.158), art.4.

⁸⁷ Otieno B., *Villa Rosa to Send Home Workers*, in *The Daily Nation*, 13th June 2020 <<https://www.nation.co.ke/kenya/business/villa-rosa-to-send-home-workers-655106>> accessed on 10th July 2020.

⁸⁸ *See* nt. (86), art.12.

⁸⁹ Social Security (Minimum Standards) Convention 1952 (No.102), part IV.

⁹⁰ *See* nt. (15), art.41(1).

⁹¹ *See* nt. (49), ss.40(1)(g) & 49(4)(h).

⁹² Article 10 of the Employment Promotion and Promotion Against Unemployment Convention 1988 (No.168) that calls for provision of benefits for employees affected by reduction of earning as a result of diminution in working hours.

⁹³ *See* nt. (49), part VI. *See, Jane Samba Mukala v. Ol Tukai Lodge Ltd.*, Industrial Cause Number 823 of 2010: [2010] LLR 255 (ICK).

⁹⁴ Workers with Family Responsibilities Convention 1981 (No.156), art.8 and General Survey Concerning Unjustified Dismissal, 1995, paras. 136 to 142.

⁹⁵ *Nation Media Group Limited v Onesmus Kilonzo* [2017] eKLR.

⁹⁶ *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR.

⁹⁷ Employment Act 2007, ss.35 (1), 36 & 38 and the Employment (General) Rules 2014, Second Schedule, r.16. Though employer may invoke *force majeure* principle or the doctrine of frustration of contracts to terminate the contract, such a ground for termination of contract must however be expressly specified in the employment contract earlier signed by the two parties.

Cement Ltd case,⁹⁸ *Janet Nyandiko* case,⁹⁹ *Pamela Ebot Arrey Effiom* case¹⁰⁰ and *Kenfreight E.A. Ltd.* case¹⁰¹ must be in a position to prove that the termination was not unfair.¹⁰² Accordingly, compliance with the labour laws is a prerequisite to a lawful termination.¹⁰³

Termination can result on account of redundancy particularly where employees cannot be utilized for any work *e.g.*, during COVID-19 or a period of recession when an organisation has less business.¹⁰⁴ However, an employer must comply with guidelines outlined in the Termination of Employment Convention 1982 (No.158), the Termination of Employment Recommendation 1982 (No.166), Part VI of the Employment Act 2007 and the Employment (General) Rules 2014 *i.e.*, an employee personally or an employee's trade union including a labour officer under jurisdiction of the employee's place of employment must be notified of the reasons leading to the intended redundancy at least not less than a month prior to termination as well as the number and category of personnel likely to be affected by the move.¹⁰⁵

In the case of termination of probationary contracts, an employer is not mandated, before terminating an employee under such a contract to explain to the employee the reason for termination but s/he is obligated to give notice of not less than seven days before termination or pay wages in lieu of such notice.¹⁰⁶

An employer is entitled to summarily dismiss or terminate the services of an employee without notice or with less notice than that to which the employee is entitled to by virtue of the existing statutory provision or contractual term particularly where s/he has breached contractual terms.¹⁰⁷ Part VI of the Employment Act 2007 outlines various circumstances that may attract such dismissal *i.e.*, where an employee fails to attend to his/her official duties or where, without permission, absents him/herself from workplace.¹⁰⁸ However, wrongful dismissal as it was held in *CMC Aviation Limited v Mohammed Noor*¹⁰⁹ is against the labour standards as set in Section 44(d) of the Employment Act 2007, the Industrial Relations Charter, the International Labour Organization Convention (Nos. 98 and 135) as well as principles of natural justice. Besides, an employee is entitled to file a complaint on unfair termination to the labour officer within a period of three months and/or to the Employment and Labour Relations Court after dismissal.¹¹⁰ If the grounds for dismissal are held invalid,

⁹⁸ *Bamburi Cement Ltd v Willima Kilonzi* CA No. 62 of 2015.

⁹⁹ *Janet Nyandiko v Kenya Commercial Bank Ltd.* [2017] eKLR.

¹⁰⁰ *International Planned Parenthood Federation v Pamela Ebot Arrey Effiom* Civil Appeal No. 132 of 2011.

¹⁰¹ *Kenfreight E.A. Ltd. v Benson K. Nguti* CA No. 31 of 2015.

¹⁰² A termination is considered unfair where for *e.g.*, an employer fails to prove that the reason or process for the termination was fair and valid, *see, supra* note 49, s.45(2). *See also, Janet Nyandiko v Kenya Commercial Bank Ltd.* [2017] eKLR.

¹⁰³ *Kenya Airways Limited v Aviation and Allied Workers Union, Kenya & 3 Others* [2014] eKLR.

¹⁰⁴ *Ibid.*

¹⁰⁵ *See nt.* (50), s.40(1), and the Employment (General) Rules 2014, Second Schedule, rules 18 & 21, Termination of Employment Convention, 1982 (No.158), arts.13 & 14 and Termination of Employment Recommendation, 1982 (No.166), para.19. *See, Abigael Jepkosgei Yator & Another v China Hanan International Co. Ltd.* [2018] eKLR; *Pure Circle (K) Ltd v Paul Koech & 12 Others* [2018] eKLR; *Kenya Airline Pilots Association v Kenya Airways Ltd.* Civil Appeal No. 276 of 2017: [2020] eKLR.

¹⁰⁶ *See nt.* (49), s.42(1) & (4) and the Employment (General) Rules 2014, Second Schedule, r.20.

¹⁰⁷ *See nt.* (50), s.44(1) & (3).

¹⁰⁸ *Ibid.*, s.44(4).

¹⁰⁹ Civil Appeal No.199 of 2013, [2015] eKLR.

¹¹⁰ *See nt.* (107), s.47(1).

the employee will, according to the decision of the Court in *James Omondi Were* case¹¹¹ *Moi Teaching & Referral Hospital* case,¹¹² *Sammwel Nguru Mutonya* case,¹¹³ *Anthony Njue John* case¹¹⁴ and *Sheikh Abubakar Bwabakai Abdalla* case¹¹⁵ be entitled to several remedies avowed in Part VI of the *Employment Act, 2007 i.e.*, reinstatement and payment of undue wages/salary.¹¹⁶

There are also certain circumstances where an employee is hired under a fixed-term contract.¹¹⁷ Such a contract, according to the decision of the Courts in *Samuel Chacha Mwita* case,¹¹⁸ *Margaret A. Achieng* case¹¹⁹ and *Rajab Barasa & 4 Others* case¹²⁰ terminates automatically after the lapse of the time specified therein thus facilitating the discretion of an employer to either renew it or not. An employee cannot therefore claim that s/he was wrongfully dismissed nor would s/he demand for reasons for non-renewal of such contract.¹²¹ This is a good ground upon which an employer with dwindling revenue impacted by COVID-19 pandemic will free an employee whose employment contract has expired without incurring any legal liability. This position had earlier been reiterated by the Employment and Labour Relations Court sitting at Mombasa in *Teresa Carlo Omondi* case.¹²²

6. Conclusions.

COVID-19 has terrifically changed the navigation map for employers globally. Its impact is now evident in every sector of the economy. Employers and employees are the hardest hit as the existing labour laws in Kenya are slowly but surely proving unresponsive to the impact of the pandemic. To mitigate loss of revenue and/or earnings amid the pandemic caused mainly by shutting down of business entities, it is high time for the Government to chip in by extending not only social safety schemes to employees who have faced the axe but also facilitating business entities through providing incentives to cushion them from the impact. Besides, it is high time:

- a) for both the employers to enhance health and safety measures at workplace and workers to exercise necessary precautions in order to curtail the transmission of the virus. For this to be effective, the Kenyan legislature need to amend *i.e.*, Sections 2,¹²³

¹¹¹ *Kenya Revenue Authority v James Omondi Were* [2020] eKLR: Civil Appeal No. 406 of 2018.

¹¹² *Moi Teaching & Referral Hospital v Hosea Cherniyot Maru* [2017] eKLR.

¹¹³ *National Bank of Kenya v Samwel Nguru Mutonya* [2019] eKLR. See, *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR; *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union CA No. 188 of 2014*.

¹¹⁴ *National Bank of Kenya Ltd. v Anthony Njue John* [2019] eKLR.

¹¹⁵ *Sheikh Abubakar Bwabakai Abdalla v Judicial Service Commission & Another* [2017] eKLR.

¹¹⁶ See nt. (107), s.49. See, *Kenya Airways v Allied Workers Union Kenya & 3 Others* [2014] eKLR and *Co-operative Bank of Kenya Ltd.*, *ibid* where the Court held that the remedy of reinstatement is not an automatic right for an employee. It is discretionary as each case depends on its own set of facts and circumstances.

¹¹⁷ *Ibid*, s.10(3)(c).

¹¹⁸ *Samuel Chacha Mwita v Kenya Medical Research Institute* [2014] eKLR.

¹¹⁹ *Margaret A. Achieng v National Water & Pipeline Corporation* [2014] eKLR.

¹²⁰ *Rajab Barasa & 4 Others v Kenya Meat Commission* [2016] eKLR.

¹²¹ See nt. (118); *Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Company Limited & Another* Cause No. 1541 of 2010; *George Onyango v The Board of Directors of Numerical Machining Limited & Others* [2014] e-KLR; *Teresa Carlo Omondi*, *infra*.

¹²² *Teresa Carlo Omondi v Transparency International, Kenya* [2017] eKLR: Cause No.863 of 2015.

¹²³ There is need to include the definition of the term 'occupational disease.'

- 6(f)(i),¹²⁴ 22(1),¹²⁵ 47(b) and (c),¹²⁶ and Second Schedule¹²⁷ of OSHA to capture COVID-19 Health Protocols outlined above.
- b) the WIBA be amended to incorporate COVID-19 in the list of Occupational Diseases in the Second Schedule of the Act to attract an employer's liability for provision of *i.e.*, insurance policy and compensation particularly where an employee contracts the disease out of and in the course of employment. This will help to ease the financial burden associated with hospitalization of an employee who has contracted the disease while engaged in an employers' business. It will also help to boost the morale of workers in an organisation.
- c) Section 10(2)(f) of the Employment Act 2007 and Rule 6(e), Second Schedule of the Employment (General) Rules 2014 be amended to expand the definition of the term 'place of work' to include remote working. Such an amendment will not only curtail instances where an employer compels employees to proceed on annual or unpaid leave particularly when faced with dwindling revenue due to COVID-19 but it will also help to continue business operations and trim down cases of breach of employment terms since the place of work could be either the 'permitted workplace' or 'remote working.' The amendment will as well make an employer liable to meet medical expenses of an employee who contracts the novel COVID-19 while working remotely.

Parliament fast track the passage of the Pandemic Response and Management Bill 2020 that was introduced in the Senate Assembly on 17th April 2020 to safeguard employees from *i.e.*, unlawful termination and address other labour related matters during the pandemic. The passage of the Bill will ensure that an employer cannot, under the guise of the adverse effects of COVID-19, declare redundancy or terminate an employee's contract of service without following due process.

Bibliography

- Alli O. B., *Fundamental Principles of Occupational Health and Safety*, 2nd edn., International Labour Office, Geneva, 2008:
https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf, accessed 08 July 2020;
- Aluga M. A., *Coronavirus Disease 2019 (COVID-19) in Kenya: Preparedness, Response and Transmissibility*, in *Elsevier Public Health Emergency Collection*, 53, 5, 2020, 671-673,
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7167550/>, accessed 08 July 2020;

¹²⁴ The word 'emerging diseases' can be added to the provision.

¹²⁵ The words "within seven days" in the section to be replaced with the word "immediately" to facilitate prompt sending of notice of COVID-19 patient details to the Director of Occupational Safety and Health Services.

¹²⁶ Cleaning of floors and surfaces at workplace should be undertaken daily in the wake of COVID-19 unlike weekly and annually as prescribed by the Act.

¹²⁷ COVID-19 should be indicated in the Schedule.

- Angote J., *The Future of Work Post COVID-19*, in *Daily Nation*, 2020, <https://www.nation.co.ke/kenya/news/the-future-of-work-post-covid-19-284482>, accessed 10 July 2020;
- ANL Kenya, *Preparing for a Safe Return to work*, 2020, <https://www.africalegalnetwork.com/kenya/wp-content/uploads/sites/22/2020/06/AK-Preparing-for-a-Safe-Return-to-Work.pdf>, accessed 10 July 2020;
- Birir C., *Working from Home: How to Cope Amid Covid-19 Pandemic*, in *The Standard Newspaper*, 2020 <https://www.standardmedia.co.ke/business/article/2001370376/covid-19-the-challenges-of-working-from-home>, accessed 10 July 2020;
- Centre for Disease Control and Prevention, *Interim Guidance for Businesses and Employers responding to Coronavirus Disease 2019*, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>, accessed 10 July 2020;
- Chiba Y., *Community Infections Could Happen Anytime’: Kenya Prepares for Covid-19*, in *The Guardian*, 2020, <https://www.theguardian.com/global-development/2020/mar/19/community-infections-could-happen-any-time-kenya-prepares-for-covid-19-coronavirus>, accessed 08 July 2020;
- ILO, *Safe to Work Guide for Employers on COVID-19 Prevention*, International Labour Office – Geneva, 2020, 3, https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_744033.pdf, accessed 10 July 2020.
- ILO, *ILO Standards and COVID-19 (Coronavirus)*, 2.1 ed., 2020, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_739937.pdf, accessed 13 July 2020;
- Kihiu N., *Restaurants Set to Reopen in Kenya Under Strict Measures Amid COVID-19 Fears*, in *The Capital News*, 2020, <https://www.capitalfm.co.ke/news/2020/04/restaurants-set-to-reopen-in-kenya-under-strict-measures-amid-covid-19-fears/>, accessed 08 July 2020;
- Kirengo T., *We’re also Making Hand Sanitizers: Kenyan Doctor on COVID-19 Impact*, 2020, <https://www.centerforfinancialinclusion.org/were-also-making-hand-sanitizer-kenyan-doctor-on-covid-19-impacts>, accessed 10 July 2020;
- Maina S., *Coronavirus Poses Ethical Concerns: A View on the Choices Being Made in Kenya*, in *The Conversation*, 2020, <https://theconversation.com/coronavirus-poses-ethical-concerns-a-view-on-the-choices-being-made-in-kenya-135338>, accessed 10 July 2020;
- Mayo Clinic, *Coronavirus Disease 2019*, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>, accessed 08 July 2020;
- Muiruri K., *Kenya Airways Staff To Take Pay Cuts as Coronavirus Hits*, in *Citizen News*, 2020, <https://citizentv.co.ke/business/kenya-airways-staff-take-pay-cuts-as-coronavirus-hits-ceo-allan-kilavuka-to-take-80-cut-327429/>, accessed 08 July 2020;
- Mwangi W., *Insurance Firms Agree to Cover Coronavirus Costs*, in *Daily Nation*, 2020 <https://www.nation.co.ke/kenya/business/insurance-firms-agree-to-cover-coronavirus-costs--278040>, accessed 10 July 2020;
- Otieno B., *Government Allows Hotels to Reopen Under Tight Anti-virus Rules*, in *Business Daily*, 2020, <https://www.businessdailyafrica.com/news/Covid19-Hotels-to-reopen-under-tight-rules/539546-5535958-2v17iez/index.html>, accessed 08 July 2020;

- Otieno B., *Villa Rosa to Send Home Workers*, in *The Daily Nation*, 2020, <https://www.nation.co.ke/kenya/business/villa-rosa-to-send-home-workers-655106>, accessed 10 July 2020;
- Prudential Life Assurance, *Prudential Customers to Get Extra Benefits if Diagnosed with COVID-19*, 2020, <https://www.prudentiallife.co.ke/media/press-release/2020-03-29/7009/>, accessed 10 July 2020;
- Ratemo T. J., *Laws Relating to Civil Servants in Kenya and India: A Critical Study*, 2014, https://shodhganga.inflibnet.ac.in/bitstream/10603/73362/12/12_chapter%203.pdf, accessed 08 July 2020;
- Tadesse T., Admassu M., *Occupational Health and Safety*, University of Gondar, Gondar, 2006, https://www.cartercenter.org/resources/pdfs/health/ephti/library/lecture_notes/env_occupational_health_students/ln_occ_health_safety_final.pdf, accessed 08 July 2020;
- UAP Old Mutual Group, *Frequently Asked Questions About the Coronavirus (COVID-19)*, <https://www.uapoldmutual.com/faqs-covid-19>, accessed 10 July 2020;
- Watta E., *Pay Cuts, Layoffs: Kenyan Media is in for a Tough Time as Ads Drop*, in *Association Internationale De La Presse Sportive*, 2020, <https://www.aipsmedia.com/index.html?page=artdetail&art=28065&CoronavirusKenya.Post-COVID-journalism>, accessed 08 July 2020;
- Rogers W. V. H., *Winfield and Jolowics on Tort by WVH Rogers*, 14th edn., Sweet & Maxwell, London, 1994, 213;
- World Health Organisation, *Coronavirus*, 2020, https://www.who.int/health-topics/coronavirus#tab=tab_1, accessed 08 July 2020;
- World Health Organisation, *Coronavirus Disease: What You Need to Know*, 2020, <https://www.afro.who.int/news/coronavirus-disease-what-you-need-know>, accessed 08 July 2020;
- World Health Organization, *Getting Your Workplace Ready for COVID-19*, 2020, <https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?ua=1>; accessed 21 October 2020;
- World Health Organization, *Q & A on Coronavirus (COVID-19) - How Long Does It Take After Exposure to COVID-19 to Develop Symptoms*, 2020, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses#>, accessed 14 July 2020.

Copyright © 2020 Ratemo Tom Junior. This article is released under a Creative Commons Attribution 4.0 International License