



KSL PARALEGAL PROGRAM -PTP 209

ELEMENTS OF EMPLOYMENT LAW

William Agan
Advocate/Lecturer &
Patent Agent

EMPLOYMENT RELATIONSHIP-LAST SESSION

Last session in a nutshell:

What is a contract?

The employer

The employee

Constitutional and Economic bases for protection of labour

THE EMPLOYMENT RELATIONSHIP

- Labour laws in Kenya
- Contract of service and contract for service
- The employer employee relationship
- Conclusion

LABOUR LAWS IN KENYA

- laws heavily drawn from English statutes and common law.
- In 2007, these were reviewed and new statutes passed by Parliament
- The previous laws were generally viewed as weak in protecting workers rights
- In 2001, a tri-partite Task Force was formed to review
- Tripartite Task force consisted of **Government, employers' organisations and workers representatives**
- Report sent to AG in 2004 with recommendations to review existing laws

LABOUR LAWS IN KENYA CNTD

- The **Employment Act, 2007**; repealing the Employment Act, Cap 226;
- The **Occupational Safety and Health Act, 2007**; repealing the Factories and Other Places of Work Act;
- The **Work Injury Benefits Act, 2007**; repealing the Workmen's Compensation Act;
- The **Labour Relations Act, 2007**; repealing the Trade Unions Act, Cap 233 and the Trade Disputes Act, Cap 234; and
- The **Labour Institutions Act, 2007**; repealing the Regulation of Wages and Conditions of Employment Act, Cap 229

RELATED STATUTES TO LABOUR

- National Social Security Fund (NSSF) Act :
 - a provident Fund that covers all employees in the private sector that are not covered by the government's pension scheme.
- The National Hospital Insurance Fund (NHIF) Act, which are reflective of the idea of the **welfare state**.
 - government state corporation with a mandate to provide health insurance to Kenyans

WELFARE UNDER EMPLOYMENT ACT 2007

Kenya (and many modern countries) continues to develop labour laws in the direction of the social welfare state in order to protect workers

Section 3(6) makes this clear in the following terms:

‘Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein shall be null and void.’

CONTRACT OF SERVICE UNDER EMPLOYMENT ACT 2007

Section 7 provides that:

‘No person shall be employed under a contract of service except in accordance with the provisions of this Act’

CONTRACT OF SERVICE AND CONTRACT FOR SERVICE

- **Contract of Service:** This is an agreement whether oral or in writing, whether expressed or implied, to employ or to serve as an employee for a period of time.
- **Employee:** A person employed for wages or salary
- **Contract for service:** This is where there is no employment relationship but there is provision of service by an individual (outsourced/consulted) by an organization. These are self employed and independent contractors
- The Employment Act 2007 regulates contracts of service **NOT** contracts for service.

CONTRACT OF SERVICE AND CONTRACT FOR SERVICE CNTD

Ingredients for existence of a contract of service:

1. Existence of an oral or written contract of service
2. Provision of service to real/natural or legal person
3. Provision of wages or salary for the services rendered

CONTRACT OF SERVICE AND CONTRACT FOR SERVICE CNTD -TESTS

- Tests /irreducible minimum:
- Control test-
 - subject to the command of the master except in highly specialized workers like doctors, lawyers and other professionals
- Integration test-
 - Worker subjected to rules and procedures of the employer

CONTRACT OF SERVICE AND CONTRACT FOR SERVICE CNTD -TESTS

- Test of economic or business reality-
 - Whether worker is an entrepreneur or works for one who takes ultimate risk of loss for profit
- Mutuality of obligations test-
 - Service for wages and promise for future performance
- The whole of above (multiple tests)-
 - Applying an individual test in a compartment may not resolve the issue thus the multiple test which combines two or more of the tests

CASE LAW- *JACKSON NDERITU WACHIRA*

Brief facts: the petitioner was engaged as consultant whose responsibilities were for overall management and day to day management. However, he was not engaged in a full time position. He was engaged for an indefinite period of time and paid a monthly salary.

Held:

The court held that Jackson was not a consultant but an employee under the Employment Act. The court applied the following criteria:

The employer had contracted the services of Jackson for a salary

Jackson provided both expert advise and was also actively involved in the day to day management of the employer

PROTECTION OUTSIDE THE EMPLOYMENT ACT 2007

The employment Act 2007 primarily protects employees in a contracts of service and not those in a contract for service.

It also does not apply to members of the Defence Forces, Police Service and Administrative Police

Does not apply to public and state officers

WHAT IS THE REMEDY?

Answer

Constitutional provisions and jurisdiction of the employment and Labour relations Court under section 12 of the Employment and labour relations Court Act and article 162 (2) of the Constitution.

Please read these provisions before the next session



THANK YOU - Q & A