

fresh thinking*

*a breakfast seminar by Oraro & Company
Advocates*



Emerging Trends in Termination of Employment: A Review of the Recent Court Cases and Changes in Labour Laws

Presented By: Chacha Odera & Georgina Ogalo-Omondi

Date: 26th April 2019



About Us

Oraro & Company Advocates is a **top-tier** full-service law firm in Nairobi, Kenya established in 1977.

We provide specialist legal services both locally and regionally in **Arbitration, Banking & Finance, Conveyancing & Real Estate, Corporate & Commercial, Dispute Resolution, Infrastructure, Projects & PPP, Restructuring & Insolvency** and **Tax**. Through our strong ties with international law firms, we provide clients with local knowledge and global perspectives.

We have been consistently ranked and recognised by Chambers Global, IFLR 1000 and Legal 500 as a top-tier firm.



Oraro & Company Advocates

Our Employment and Labour Practice

Regarded as the “go-to” firm for employment work, our employment and labour practice area is well regarded by the Chambers Global Guide and Legal 500 for advising some of Kenya’s high profile employment matters.

We represent large local, regional and international organisations in all aspects of employment and labour law including: **employment disputes, employment contracts, employee benefits, collective bargaining agreements, reviewing HR policies and procedures, undertaking employment audits for compliance purposes and employee stock ownership plans and pensions.**



In this presentation

Part I: Current legal requirements in termination

- Termination on notice
- Voluntary early retirement
- Expiry of fixed-term contracts
- Redundancy
- Constructive Dismissal
- Termination Due to Incapacity
- Summary Dismissal

Part II: Developments in Kenyan Employment Law

Q&A

Part I: Current legal requirements in termination



ORARO & COMPANY
ADVOCATES

Termination on Notice

A contract of service may be terminated upon **either party giving notice** as provided for under the Act. (s. 35)

Where there is an express contract of service, termination must be guided by the agreed provisions.

An employee whose contract of service is terminable by a notice of 28 days shall be entitled to service pay for every year worked.



Termination on Notice – Contd.

However, the employee will not be entitled to service pay where the employee is a member of a **registered pension** or **provident fund scheme** under the Retirement Benefits Act; a **gratuity** or **service pay scheme** established under a collective agreement; **any other scheme** established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and the **National Social Security Fund**.

Voluntary Early Retirement (VER)

VER is not expressly provided for in the Kenyan law. It is a form of termination which is normally spoken of in the context of an organizational restructure or downsizing. It is seen as one of the alternatives to redundancy.

VER is an offer made by the employer to employees who are not yet of retirement age but who wish to retire early. The hope of the employer is for as many as are offered to take up the VER thereby to enable the employer to avoid legal risks associated with redundancies.

Like any other contract, a VER agreement can be nullified where **coercion, undue influence, mistake or misrepresentation** is proved. (See the case of *John Mwove & 97 others v Kenya Meat Commission [2018] eKLR* & *National Bank of Kenya Limited v Hamida Bana & 103 others [2017] eKLR*)

Expiry of Fixed-term Contracts

The Employment Act contemplates that parties can enter into a fixed term contract as a valid mode of employment (**s.10 (3) (c)**).

The underlying understanding between the parties of fixed-term contracts is that once the fixed period has ended, the contract is automatically terminated without any further liability on the employer's part on account of unfair termination or redundancy.

The ELRC has in many instances recognized fixed term contracts and that renewal of such contracts is discretionary (***See Rajab Barasa & 4 Others v. Kenya Meat Commission (2016) eKLR***)

Expiry of Fixed-term Contracts - Exception

Legitimate Expectation

There are certain situations when an employees may be able to successfully claim unfair termination if a fixed-term contract is not renewed – for example, where employees can prove that they had a legitimate expectation that their contract would be renewed.

The courts have held that legitimate expectation is not a mere anticipation, wish, desire or hope. The expectation must be based on a cogent, rational and objective reason induced by the employer either expressly or by conduct. (See ***Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR***)

Expiry of Fixed-term Contracts - Exception

A **probationary contract** is defined under the Act to mean “a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.”

Section 42 of the Act provides for termination probationary contracts.

Termination of Probationary Contracts – either party may give not less than a 7 days’ notice. (s. 42 (4))

Case Law

Carole Nyambura Thiga v Oxfam [2013] eKLR

Danish Jalang’o & another v Amicabre Travel Services Limited [2014] eKLR

Redundancy

Redundancy has been defined 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 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.”

(s. 2 of the Employment Act & s. 2 of the Labour Relations Act, 2007.)



Cases

Kenya Union of Commercial Food and Allied Workers v British American Tobacco Kenya Ltd

The ELRC held that redundancy is a fact of life which cannot be wished away and in as much as an employer is entitled to embark on reducing its total number of employees, it must comply with the law and the collective bargaining agreement where there is a union.

Kenya Airways v Tobias Oganya Auma & 5 others

The Court of Appeal held that it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations.

Constructive Dismissal

Constructive Dismissal arises where an employee resigns in response to a fundamental breach of the contract by the employer. It is not expressly provided for in the Kenyan Employment law, but the Courts have recognized and applied it as one of the grounds for wrongful and unfair termination.

An employee is said to have been constructively dismissed if the employer is in breach of a fundamental term of the contract which makes the employment relationship untenable; and the employee resigns in response to that breach. (See ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR***).

Constructive Dismissal

The Court of Appeal in the Coca Cola case developed the main tests in proving a claim of constructive dismissal as follows:

- a) The employer must be in breach of the contract of employment;*
- b) The breach must be fundamental as to be considered a repudiatory breach;*
- c) The employee must resign in response to that breach; and*
- d) The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.*

Constructive Dismissal – Contd.

*Examples of conduct that have been found to lead to constructive dismissal include **frequent unjustifiable transfers, forceful resignations, non-payment of salaries, unwarranted suspensions, non-consensual changes in the job descriptions and job titles, downgrades in positions, sexual harassment etc.***

It has been observed that the employee must give a history of treatment that would be considered as a “*hostile environment at work*” to warrant a claim for summary dismissal. (See ***Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR***). It was however noted that the same does not justify absenteeism of the employee from work. In essence, to keep out of work and fail to serve the employer with a resignation letter or make attempts to resolve the existing conflicts may compromise a claim for constructive dismissal.

Constructive Dismissal – Contd.

Constructive dismissal can only be successful if the resignation is unequivocal and originates from the employee. A claim for constructive dismissal can therefore be compromised if the employee takes steps that may be construed as intentions to remain in employment. (See ***Edwin Beiti Kipchumba v National Bank of Kenya Limited*** [2018] eKLR)

Termination due to Incapacity

Termination on grounds of physical incapacity is recognized under section 41 of the Act.

Where an employee is, during the course of his employment killed or incapacitated by an injury for a period exceeding three days, his employer shall as soon as practicable, send to the labour officer or, if there is no labour officer to a district commissioner a report in the prescribed form. ***(See Section 24 (5) of the Employment Act, 2007)***

Is termination of an employee on medical grounds lawful?

Physical incapacity may be simply defined as “*not being able to perform any gainful employment due to congenital disability, illness (including mental), physical injury or intellectual deficiency.*”

Disputes for injuries suffered in the workplace are ordinarily filed during the subsistence of the employment relationship. An employer who terminates the services of an employee on account of being sued in this manner would be held liable for unfair termination. (See ***Justus Katana Charo v Ready Consultancy Company Limited [2015] eKLR***)

Summary Dismissal

The Act provides that summary dismissal 'shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.' (See Section 44 (1) of the Employment Act, 2007)

The grounds upon which an employee can be summarily dismissed are set out in the Act but the list is not exhaustive. Additional grounds may be set out in the contract or the Human Resources Manual.

Before summary dismissal, an employee must be afforded an **opportunity to be heard** and defend himself in a **disciplinary hearing**. (See *Fred Makori Ondari v The Management Committee of The Ministry of Works Sports Club [2013] eKLR*)

Procedure

- 1) Investigations
- 2) Notice to show cause
- 3) Disciplinary hearing
- 4) Recess to consider the representations made by the employee
- 5) Delivery of ruling
- 6) Employer to maintain proper minutes of the disciplinary process
- 7) Employee has the right to appeal

Part II: Developments in Kenyan Employment Law



ORARO & COMPANY
ADVOCATES

Recent Laws

There have been various developments in the employment law arena through **Acts of Parliament, Orders and Guidelines**.

Recent Laws

Finance Act, 2018 - introduced an amendment to the Employment Act (**the Act**) through the insertion of **section 31A**. This section introduced the **housing levy** payable to the **National Housing Development Fund**.

On 16th April 2019, the **ELRC issued temporary orders** stopping the government from implementing this new provision.

***The Statute Law (Miscellaneous Amendment) Act, No. 4 of 2018 &
The Statute Law (Miscellaneous Amendment) Act, No. 18 Of 2018***

Some notable amendments include:

a) Export Processing Zone Wages Council

The Council is established to **regulate salaries of employees** working across various industries and to ensure **minimum wage requirements** are met by employers.

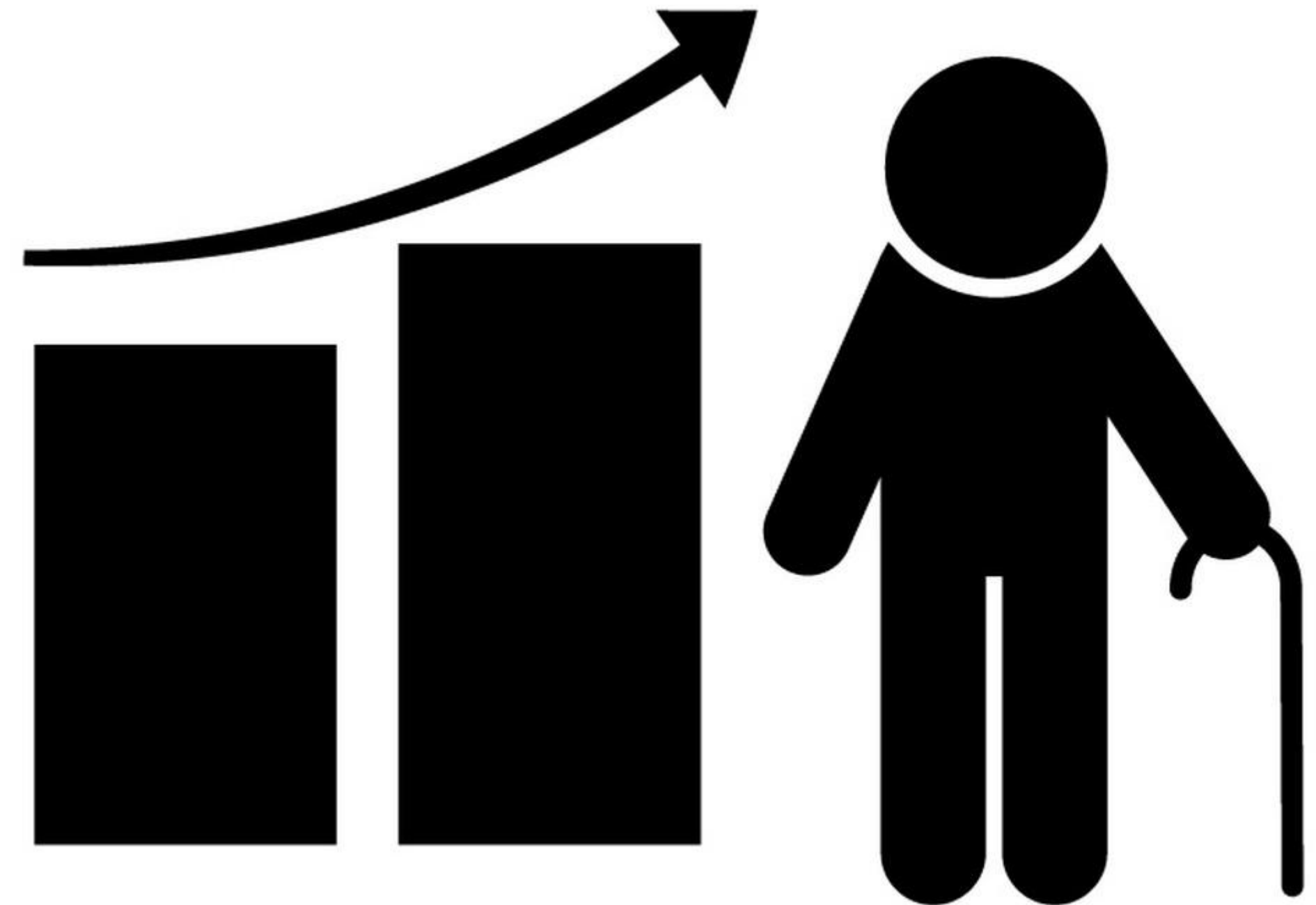
b) Protected strikes and lock-outs

Protected limitation of constitutional right to strike for employees performing **essential services** for the general public such as health providers.

Recent Laws – Contd.

The Retirements Benefits (Post- Retirement Medical Funds) Guidelines, 2008

Issued by the **Retirement Benefits Authority** to facilitate the establishment, regulation and supervision of the management of post-retirement medical funds.



Orders

The Kenya Union Of Domestic Hotels, Educational Institutions and Hospital Workers (Deduction Of Union Dues) Order

Made in November 2018 by the CS, Labour and Social Protection. It seeks to **regulate the dues of employees** where an employer employs more than 5 members of this union.

The employer ought to **deduct 2%** from the gross salary of an employee but **not exceed Kshs. 500** and remit the same within **10 days** to the Union.

The Dock Workers Union (Deduction of Union Dues) Order

Regulates the dues of employees who are members of this union. Employers are required to **deduct 2%** of gross salary of their employees and remit to the Union.

Proposed Laws

The Breastfeeding Mothers Bill, 2017

Contains provisions on employer's obligations towards breastfeeding mothers in the workplace. The Bill provides that a woman may breastfeed her baby or breastfeed express breast milk at a lactation place in the workplace **during working hours**.

The Bill proposes **punitive action** for employers who do not comply with its provisions. Such employers shall be liable upon conviction to a **fine not exceeding Kshs. 500,000** or to an imprisonment for a **term not exceeding 1 year**, or both.

Proposed Laws – Contd.

The Employment (Amendment) Bill, 2019

The Bill intends to amend the Employment Act, 2007 by introducing some new concepts and clarifying other issues such as:

Pre-Adoption Leave - 3 months leave with full pay for female employees and 2 weeks' leave for their male counterparts.



Proposed Laws – Contd.

Maternity leave - extended to 6 months (three months leave with pay and the remaining 3 months without pay) .The additional 3 months leave will be subject to the consent of the employer. The female employee must give her employer a 7 days' notice of extension of leave.

Probationary Contract – the Bill attempts to distinguish the rights upon termination of an employee serving under a probationary contract and those of a permanent employee.

Any Questions?



Thank You

The Speakers



With over 30 years of experience, Chacha has represented local and international clients in arbitration, mediation, banking & commercial litigation, constitutional law, electoral law, **employment & labour disputes** and property law.

E: chacha@oraro.co.ke



A Partner in the litigation department, Georgina specialises in Dispute Resolution and Mediation and with over seven years of experience, she has advised local and international clients in a wide variety of **complex employment and labour disputes**, commercial and family law.

E: georgina@oraro.co.ke



T: +254 709 250 000

E: legal@oraro.co.ke | W: www.oraro.co.ke

Disclaimer: This presentation is intended for educational purposes only, it is not for circulation and does not constitute legal advice.
Legal advice should be sought for specific queries or circumstances.